STATE LAW LIBRARY OF MONTANA

Joseph P. Mazurek Justice Building
215 North Sanders Street
PO Box 203004
Helena, MT 59620-3004

Website: courts.mt.gov/library
Email: mtlawlibrary@mt.gov
Phone: 406-444-3660
Fax: 406-444-3603

Legislative History – Montana Session Law

Chapter: 251 Session L: 2009

Bill Number: HB 40

Checklist of Bill History

History and Final Status Sheet	☒
Introduced Bill	☒
Fiscal Note	☒
Third Reading Bill	☒
Final Version of Bill	☒

House

Committee: Natural Resources

Hearing Date(s): 01/21/2009

Committee Report: Bill passed as amended

Senate

Committee: Natural Resources

Hearing Date(s): 03/06/2009

Committee Report: Concurred as amended

Conference Committee

Hearing Date(s):

Conference Committee Report:

Compiler Notes

Compiled by: Charlotty Herman

Date: 05/18/2026

Notes: No Conference Committee

Ch. 91 . . . . . SB 170
Ch. 92 . . . . . SB 182
Ch. 93 . . . . . SB 196
Ch. 94 . . . . . SB 219
Ch. 95 . . . . . SB 255
Ch. 96 . . . . . SB 262
Ch. 97 . . . . . SB 296
Ch. 98 . . . . . SB 331
Ch. 99 . . . . . SB 376
Ch. 100 . . . . . SB 390
Ch. 101 . . . . . SB 438
Ch. 102 . . . . . HB 192
Ch. 103 . . . . . HB 39
Ch. 104 . . . . . HB 41
Ch. 105 . . . . . HB 45
Ch. 106 . . . . . HB 48
Ch. 107 . . . . . HB 75
Ch. 108 . . . . . HB 78
Ch. 109 . . . . . HB 80
Ch. 110 . . . . . HB 82
Ch. 111 . . . . . HB 118
Ch. 112 . . . . . HB 119
Ch. 113 . . . . . HB 129
Ch. 114 . . . . . HB 137
Ch. 115 . . . . . HB 139
Ch. 116 . . . . . HB 140
Ch. 117 . . . . . HB 153
Ch. 118 . . . . . HB 179
Ch. 119 . . . . . HB 203
Ch. 120 . . . . . HB 204
Ch. 121 . . . . . HB 223
Ch. 122 . . . . . HB 230
Ch. 123 . . . . . HB 244
Ch. 124 . . . . . HB 270
Ch. 125 . . . . . HB 283
Ch. 126 . . . . . HB 288
Ch. 127 . . . . . HB 294
Ch. 128 . . . . . HB 308
Ch. 129 . . . . . HB 363
Ch. 130 . . . . . HB 366
Ch. 131 . . . . . HB 383
Ch. 132 . . . . . HB 432
Ch. 133 . . . . . HB 545
Ch. 134 . . . . . SB 47
Ch. 135 . . . . . SB 49
Ch. 136 . . . . . SB 184
Ch. 137 . . . . . SB 216
Ch. 138 . . . . . SB 323
Ch. 139 . . . . . HB 106
Ch. 140 . . . . . HB 304
Ch. 141 . . . . . HB 311
Ch. 142 . . . . . HB 324
Ch. 143 . . . . . SB 141
Ch. 144 . . . . . SB 173
Ch. 145 . . . . . SB 208
Ch. 146 . . . . . SB 409
Ch. 147 . . . . . HB 24
Ch. 148 . . . . . HB 67
Ch. 149 . . . . . HB 72
Ch. 150 . . . . . HB 93
Ch. 151 . . . . . HB 367
Ch. 152 . . . . . SB 20
Ch. 153 . . . . . SB 82
Ch. 154 . . . . . SB 197
Ch. 155 . . . . . SB 319
Ch. 156 . . . . . SB 325
Ch. 157 . . . . . SB 368
Ch. 158 . . . . . SB 432
Ch. 159 . . . . . HB 21
Ch. 160 . . . . . HB 54
Ch. 161 . . . . . HB 58
Ch. 162 . . . . . HB 146
Ch. 163 . . . . . HB 155
Ch. 164 . . . . . HB 193
Ch. 165 . . . . . HB 214
Ch. 166 . . . . . HB 307
Ch. 167 . . . . . HB 372
Ch. 168 . . . . . HB 387
Ch. 169 . . . . . HB 621
Ch. 170 . . . . . HB 623
Ch. 171 . . . . . SB 74
Ch. 172 . . . . . SB 111
Ch. 173 . . . . . SB 143
Ch. 174 . . . . . SB 185
Ch. 175 . . . . . SB 188
Ch. 176 . . . . . SB 209
Ch. 177 . . . . . SB 250
Ch. 178 . . . . . SB 273
Ch. 179 . . . . . SB 340
Ch. 180 . . . . . SB 341
Ch. 181 . . . . . SB 395
Ch. 182 . . . . . HB 326
Ch. 183 . . . . . SB 21
Ch. 184 . . . . . HB 133
Ch. 185 . . . . . HB 144
Ch. 186 . . . . . HB 163
Ch. 187 . . . . . HB 195
Ch. 188 . . . . . HB 197
Ch. 189 . . . . . HB 221
Ch. 190 . . . . . HB 243
Ch. 191 . . . . . HB 290
Ch. 192 . . . . . HB 291
Ch. 193 . . . . . HB 317
Ch. 194 . . . . . HB 354
Ch. 195 . . . . . HB 365
Ch. 196 . . . . . HB 397
Ch. 197 . . . . . HB 400
Ch. 198 . . . . . HB 407
Ch. 199 . . . . . HB 530
Ch. 200 . . . . . HB 593
Ch. 201 . . . . . HB 190
Ch. 202 . . . . . HB 104
Ch. 203 . . . . . HB 116
Ch. 204 . . . . . HB 161
Ch. 205 . . . . . HB 246
Ch. 206 . . . . . HB 263
Ch. 207 . . . . . HB 264
Ch. 208 . . . . . HB 386
Ch. 209 . . . . . HB 402
Ch. 210 . . . . . HB 403
Ch. 211 . . . . . HB 495
Ch. 212 . . . . . HB 509
Ch. 213 . . . . . HB 513
Ch. 214 . . . . . HB 534
Ch. 215 . . . . . HB 572
Ch. 216 . . . . . HB 626
Ch. 217 . . . . . SB 124
Ch. 218 . . . . . SB 192
Ch. 219 . . . . . SB 276
Ch. 220 . . . . . SB 405
Ch. 221 . . . . . SB 447
Ch. 222 . . . . . HB 71
Ch. 223 . . . . . HB 95
Ch. 224 . . . . . HB 103
Ch. 225 . . . . . HB 107
Ch. 226 . . . . . HB 112
Ch. 227 . . . . . HB 127
Ch. 228 . . . . . HB 177
Ch. 229 . . . . . HB 218
Ch. 230 . . . . . HB 328
Ch. 231 . . . . . HB 338
Ch. 232 . . . . . HB 343
Ch. 233 . . . . . HB 373
Ch. 234 . . . . . HB 378
Ch. 235 . . . . . HB 380
Ch. 236 . . . . . HB 477
Ch. 237 . . . . . HB 504
Ch. 238 . . . . . HB 517
Ch. 239 . . . . . HB 529
Ch. 240 . . . . . HB 542
Ch. 241 . . . . . HB 563
Ch. 242 . . . . . HB 591
Ch. 243 . . . . . SB 68
Ch. 244 . . . . . SB 136
Ch. 245 . . . . . SB 200
Ch. 246 . . . . . SB 261
Ch. 247 . . . . . SB 275
Ch. 248 . . . . . SB 294
Ch. 249 . . . . . SB 311
Ch. 250 . . . . . HB 23
Ch. 251 . . . . . HB 40
Ch. 252 . . . . . HB 147
Ch. 253 . . . . . HB 222
Ch. 254 . . . . . HB 357
Ch. 255 . . . . . HB 362
Ch. 256 . . . . . HB 371
Ch. 257 . . . . . HB 374
Ch. 258 . . . . . HB 404
Ch. 259 . . . . . HB 412
Ch. 260 . . . . . HB 416
Ch. 261 . . . . . HB 466
Ch. 262 . . . . . HB 544
Ch. 263 . . . . . HB 574
Ch. 264 . . . . . HB 588
Ch. 265 . . . . . SB 9
Ch. 266 . . . . . SB 71
Ch. 267 . . . . . SB 95
Ch. 268 . . . . . SB 96
Ch. 269 . . . . . SB 104
Ch. 270 . . . . . SB 123
Ch. 271 . . . . . SB 133
Ch. 272 . . . . . SB 151
Ch. 273 . . . . . SB 222
Ch. 274 . . . . . SB 227
Ch. 275 . . . . . SB 228
Ch. 276 . . . . . SB 297
Ch. 277 . . . . . SB 308
Ch. 278 . . . . . SB 367
Ch. 279 . . . . . SB 392
Ch. 280 . . . . . SB 426
Ch. 281 . . . . . SB 463
Ch. 282 . . . . . HB 59
Ch. 283 . . . . . HB 109
Ch. 284 . . . . . HB 170
Ch. 285 . . . . . SB 22
Ch. 286 . . . . . SB 57
Ch. 287 . . . . . SB 58
Ch. 288 . . . . . SB 62
Ch. 289 . . . . . SB 113
Ch. 290 . . . . . SB 126
Ch. 291 . . . . . SB 148
Ch. 292 . . . . . SB 156
Ch. 293 . . . . . SB 174
Ch. 294 . . . . . SB 202
Ch. 295 . . . . . SB 280
Ch. 296 . . . . . SB 424
Ch. 297 . . . . . HB 19
Ch. 298 . . . . . HB 34
Ch. 299 . . . . . HB 409
Ch. 300 . . . . . HB 420
Ch. 301 . . . . . HB 443
Ch. 302 . . . . . HB 451
Ch. 303 . . . . . HB 475

1/06	FISCAL NOTE SIGNED		
1/06	FISCAL NOTE PRINTED		
1/14	HEARING		
1/17	COMMITTEE EXEC ACTION—BILL PASSED	16	2
1/17	COMMITTEE REPORT—BILL PASSED		
1/20	2ND READING PASSED	78	20
1/21	3RD READING PASSED	77	22
	TRANSMITTED TO SENATE		
2/20	REFERRED TO NATURAL RESOURCES		
3/06	HEARING		
3/10	COMMITTEE EXEC ACTION—CONCURRED AS AMD	9	0
3/10	COMMITTEE REPORT—CONCURRED AS AMD		
3/12	2ND READING CONCURRED ON VOICE VOTE	47	2
3/13	3RD READING CONCURRED	42	7
	RETURNED TO HOUSE WITH AMENDMENTS		
3/18	2ND READING SENATE AMDS CONCURRED	74	26
3/19	3RD READING PASSED AS AMENDED BY SENATE	81	18
3/19	SENT TO ENROLLING		
3/20	RETURNED FROM ENROLLING		
3/21	SIGNED BY SPEAKER		
3/21	SIGNED BY PRESIDENT		
3/23	TRANSMITTED TO GOVERNOR		
4/01	SIGNED BY GOVERNOR		
4/01	CHAPTER NUMBER ASSIGNED		
	CHAPTER NUMBER 103		
	EFFECTIVE DATE: 4/01/2009 - ALL SECTIONS		

HB 40 INTRODUCED BY COHENOUR *LC0430 DRAFTER: KOLMAN*

REVISE WATER RIGHT PERMIT PROCESS

BY REQUEST OF WATER POLICY COMMITTEE

9/15	FISCAL NOTE PROBABLE		
12/03	INTRODUCED		
12/12	REFERRED TO NATURAL RESOURCES		
12/12	FISCAL NOTE REQUESTED		
12/31	FISCAL NOTE RECEIVED		
1/06	FISCAL NOTE SIGNED		
1/07	FISCAL NOTE PRINTED		
1/21	HEARING		
1/24	COMMITTEE EXEC ACTION—BILL PASSED AS AMENDED	18	0
1/24	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/28	2ND READING PASSED	100	0
1/29	3RD READING PASSED	99	0
	TRANSMITTED TO SENATE		
2/20	REFERRED TO NATURAL RESOURCES		
3/06	HEARING		
3/30	COMMITTEE EXEC ACTION—CONCURRED AS AMD	11	0
3/30	COMMITTEE REPORT—CONCURRED AS AMD		
4/01	2ND READING CONCURRED ON VOICE VOTE	50	0
4/02	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE WITH AMENDMENTS		
4/06	2ND READING SENATE AMDS CONCURRED	97	1
4/07	3RD READING PASSED AS AMENDED BY SENATE	96	3
4/07	SENT TO ENROLLING		
4/08	RETURNED FROM ENROLLING		
4/09	SIGNED BY SPEAKER		
4/09	SIGNED BY PRESIDENT		
4/09	TRANSMITTED TO GOVERNOR		
4/17	SIGNED BY GOVERNOR		
4/17	CHAPTER NUMBER ASSIGNED		
	CHAPTER NUMBER 251		
	EFFECTIVE DATE: 7/01/2009 - ALL SECTIONS		

HB 41 INTRODUCED BY COHENOUR *LC0433 DRAFTER: KOLMAN*

REVISE WATER QUALITY LAWS FOR AQUIFER RECHARGE OR MITIGATION

BY REQUEST OF WATER POLICY COMMITTEE

12/03	INTRODUCED
12/12	REFERRED TO NATURAL RESOURCES

HOUSE BILL NO. 40

INTRODUCED BY J. COHENOUR

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; PROVIDING FOR OBJECTIONS TO BE HEARD IN AN INFORMAL HEARING; REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; AND AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(5) "Certificate" means a certificate of water right issued by the department.

(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information <u>for the department to begin evaluating the information</u>.

(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(10) "Department" means the department of natural resources and conservation provided for in Title 2,

chapter 15, part 33.

(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(13) "Ground water" means any water that is beneath the ground surface.

(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(25) "Water division" means a drainage basin as defined in 3-7-102.

(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

(27) "Water master" means a master as provided for in Title 3, chapter 7.

(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application for permit or change in appropriation right. (1) Upon receipt of an application for a permit or a change in appropriation right, the department shall publish notice of receipt of the application on the department's website.

~~(1)~~(2) (a) ~~Upon~~ Within 120 days of the receipt of a correct and complete application for a permit or change in appropriation right, the department:

(i) may meet informally with the applicant and the persons listed in subsection (2)(d) to discuss the application;

(ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and

(iii) may include conditions in the written preliminary determination to satisfy applicable criteria for issuance of a permit or change in appropriation right.

(b) If the preliminary determination proposes to grant an application, the department shall prepare a notice containing the facts pertinent to the application, including the summary of the preliminary determination and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source.

(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310 must be followed.

~~(b)~~(d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

~~(c)~~(e) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

~~(d)~~(f) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

~~(2)~~(3) The notice ~~shall~~ must state that by a date set by the department, ~~(~~not less than 15 days or more than 60 days after the date of publication~~)~~, persons may file with the department written objections to the application.

~~(3)~~(4) The requirements of subsections ~~(1)~~ (2) and ~~(2)~~ (3) do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

Section 3. Section 85-2-308, MCA, is amended to read:

"85-2-308. Objections. (1) (a) An objection to an application under this chapter must be filed by the date specified by the department under 85-2-307~~(2)~~(3).

(b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402, 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. In order to assist both applicants and objectors, the department shall adopt rules in accordance with this chapter

delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife, and recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected and to identify the point or points where the instream flow water right is measured and monitored. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.

(6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under this section and rules of the department."

Section 4. Section 85-2-309, MCA, is amended to read:

"85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit under 85-2-311 or change ~~approval~~ in appropriation right under 85-2-402 states a valid objection, it shall hold a ~~contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections,~~ hearing pursuant to 2-4-604 for the objector to show cause before the department as to why the permit or change in appropriation right should not be granted or should be granted with additional or different conditions after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). The applicant shall participate in this hearing and retains the burden of proof on the applicable criteria. The department may consolidate hearings if more than one objection is filed to an application. The department shall allow for discovery. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322."

Section 5. Section 85-2-310, MCA, is amended to read:

"85-2-310. Action on application for permit or change in appropriation right. (1) ~~The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.~~ If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

(2) A proposal to grant an application with or without conditions following a hearing on a proposal to deny the application must proceed as if the department proposed to grant the application in its preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department may consider, without hearing, the proposed conditions and grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

~~(2)~~(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use

authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

~~(3)~~(7) Except as provided in subsection ~~(2)~~ (6), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department~~,~~ unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

~~(4)~~(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

~~(5)~~(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;

(ii) the proposed place of use of all water applied for;

(iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection ~~(4)(c)(iii)~~ (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water; or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124."

Section 6. Section 85-2-401, MCA, is amended to read:

"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July 1, 1973. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, ~~85-2-310(4)~~ 85-2-310(8), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part 2 of this chapter.

(4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation authorization by the department."

Section 7. Section 85-2-804, MCA, is amended to read:

"85-2-804. Application -- notice -- objections -- hearing. (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion, construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the proposed means of diversion, construction, and operation are adequate;

(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(c) the applicant intends to comply with the compact.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in ~~subsections (1) and (2) of~~ 85-2-307(1) through (3).

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector to an application under subsection (1) shall state his name and address and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana are not for a beneficial use of water;

(b) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(c) the proposed means of diversion, construction, and operation are not adequate;

(d) the diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water right, a permit, or a reserved water right;

(e) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state; or

(f) the diversion and ultimate use of the water are not in the public interest of Montana.

(6) The objector to an application under subsection (2) shall state his name and address and facts tending to show that:

(a) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(b) the proposed means of diversion, construction, and operation are not adequate; or

(c) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state.

(7) If the department receives an objection to an application, it shall hold a hearing on the application within 60 days from the date set by the department for filing objections. Service of notice of the hearing must be made by certified mail upon the applicant and the objector.

(8) The hearing shall be conducted under the contested case procedures of the Montana Administrative Procedure Act in Title 2, chapter 4, part 6."

- END -

HOUSE BILL NO. 40

INTRODUCED BY J. COHENOUR

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; ~~PROVIDING FOR OBJECTIONS TO BE HEARD IN AN INFORMAL HEARING;~~ REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; AND AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(5) "Certificate" means a certificate of water right issued by the department.

(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information <u>for the department to begin evaluating the information</u>.

(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(10) "Department" means the department of natural resources and conservation provided for in Title 2,

chapter 15, part 33.

(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(13) "Ground water" means any water that is beneath the ground surface.

(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(25) "Water division" means a drainage basin as defined in 3-7-102.

(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

(27) "Water master" means a master as provided for in Title 3, chapter 7.

(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application for permit or change in appropriation right. (1) Upon receipt of an application for a permit or a change in appropriation right, the department shall publish notice of receipt of the application on the department's website.

~~(1)~~(2) (a) ~~Upon~~ Within 120 days of the receipt of a correct and complete application for a permit or change in appropriation right, the department:

(i) may meet informally with the applicant ~~and~~, the persons listed in subsection (2)(d), AND PERSONS WHO MAY CLAIM STANDING PURSUANT TO 85-2-308 to discuss the application;

(ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and

(iii) may include conditions in the written preliminary determination to satisfy applicable criteria for issuance of a permit or change in appropriation right.

(b) If the preliminary determination proposes to grant an application, the department shall prepare a notice containing the facts pertinent to the application, including the summary of the preliminary determination and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source.

(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310 must be followed.

~~(b)~~(d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

~~(c)~~(e) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

~~(d)~~(f) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

~~(2)~~(3) The notice ~~shall~~ must state that by a date set by the department, ~~(~~not less than 15 days or more than 60 days after the date of publication~~)~~, persons may file with the department written objections to the application.

~~(3)~~(4) The requirements of subsections ~~(1)~~ (2) and ~~(2)~~ (3) do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

Section 3. Section 85-2-308, MCA, is amended to read:

"85-2-308. Objections. (1) (a) An objection to an application under this chapter must be filed by the date specified by the department under 85-2-307~~(2)~~(3).

(b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402, 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. In order to assist both applicants and objectors, the department shall adopt rules in accordance with this chapter

delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife, and recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected and to identify the point or points where the instream flow water right is measured and monitored. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.

(6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under this section and rules of the department."

Section 4. Section 85-2-309, MCA, is amended to read:

"85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit under 85-2-311 or change ~~approval~~ in appropriation right under 85-2-402 states a valid objection, it shall hold a ~~contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections, hearing pursuant to 2-4-604 for the objector to show cause before the department as to why the permit or change in appropriation right should not be granted or should be granted with additional or different conditions~~ CONTESTED CASE HEARING, PURSUANT TO TITLE 2, CHAPTER 4, PART 6, ON THE OBJECTION WITHIN 90 DAYS FROM THE DATE SET BY THE DEPARTMENT FOR THE FILING OF OBJECTIONS after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). ~~The applicant shall participate in this hearing and retains the burden of proof on the applicable criteria.~~ The department may consolidate hearings if more than one objection is filed to an application. ~~The department shall allow for discovery.~~ THE DEPARTMENT MAY EXTEND THE 90-DAY DEADLINE FOR GOOD CAUSE SHOWN OR UPON REQUEST OF THE APPLICANT AND ALL OBJECTORS. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party

to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322."

Section 5. Section 85-2-310, MCA, is amended to read:

"85-2-310. Action on application for permit or change in appropriation right. (1) (A) ~~The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.~~ If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

(B) (I) UPON REQUEST FROM THE APPLICANT, THE DEPARTMENT SHALL APPOINT A HEARING EXAMINER WHO DID NOT PARTICIPATE IN THE PRELIMINARY DETERMINATION.

(II) THE APPLICANT MAY MAKE ONLY ONE REQUEST PURSUANT TO THIS SUBSECTION (1)(B) FOR A DIFFERENT HEARING EXAMINER.

(2) A proposal to grant an application with or without conditions following a hearing on a proposal to deny the application must proceed as if the department proposed to grant the application in its preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the

applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department ~~may consider, without hearing, the proposed conditions and~~ SHALL grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

~~(2)~~(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

~~(3)~~(7) Except as provided in subsection ~~(2)~~ (6), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department~~,~~ unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

~~(4)~~(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

~~(5)~~(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;

(ii) the proposed place of use of all water applied for;

(iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection ~~(4)(c)(iii)~~ (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water; or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124."

Section 6. Section 85-2-401, MCA, is amended to read:

"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July 1, 1973. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, ~~85-2-310(4)~~ 85-2-310(8), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part 2 of this chapter.

(4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation authorization by the department."

Section 7. Section 85-2-804, MCA, is amended to read:

"85-2-804. Application -- notice -- objections -- hearing. (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion, construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the proposed means of diversion, construction, and operation are adequate;

(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(c) the applicant intends to comply with the compact.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in ~~subsections (1) and (2) of~~ 85-2-307(1) through (3).

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector to an application under subsection (1) shall state his name and address and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana are not for a beneficial use of water;

(b) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(c) the proposed means of diversion, construction, and operation are not adequate;

(d) the diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water right, a permit, or a reserved water right;

(e) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state; or

(f) the diversion and ultimate use of the water are not in the public interest of Montana.

(6) The objector to an application under subsection (2) shall state his name and address and facts tending to show that:

(a) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(b) the proposed means of diversion, construction, and operation are not adequate; or

(c) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state.

(7) If the department receives an objection to an application, it shall hold a hearing on the application within 60 days from the date set by the department for filing objections. Service of notice of the hearing must be made by certified mail upon the applicant and the objector.

(8) The hearing shall be conducted under the contested case procedures of the Montana Administrative Procedure Act in Title 2, chapter 4, part 6."

- END -

HOUSE BILL NO. 40

INTRODUCED BY J. COHENOUR

BY REQUEST OF THE WATER POLICY COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; ~~PROVIDING FOR OBJECTIONS TO BE HEARD IN AN INFORMAL HEARING;~~ REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; ~~AND~~ AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(5) "Certificate" means a certificate of water right issued by the department.

(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information <u>for the department to begin evaluating the information</u>.

(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(10) "Department" means the department of natural resources and conservation provided for in Title 2,

chapter 15, part 33.

(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(13) "Ground water" means any water that is beneath the ground surface.

(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(25) "Water division" means a drainage basin as defined in 3-7-102.

(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

(27) "Water master" means a master as provided for in Title 3, chapter 7.

(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application for permit or change in appropriation right. (1) Upon receipt of an application for a permit or a change in appropriation right, the department shall publish notice of receipt of the application on the department's website.

~~(1)~~(2) (a) ~~Upon~~ Within 120 days of the receipt of a correct and complete application for a permit or change in appropriation right, the department:

(i) may meet informally with the applicant ~~and~~, the persons listed in subsection (2)(d), AND PERSONS WHO MAY CLAIM STANDING PURSUANT TO 85-2-308 to discuss the application;

(ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and

(iii) may include conditions in the written preliminary determination to satisfy applicable criteria for issuance of a permit or change in appropriation right.

(b) If the preliminary determination proposes to grant an application, the department shall prepare a notice containing the facts pertinent to the application, including the summary of the preliminary determination and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source.

(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310 must be followed.

~~(b)~~(d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

~~(c)~~(e) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

~~(d)~~(f) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

~~(2)~~(3) The notice ~~shall~~ must state that by a date set by the department, ~~(~~not less than 15 days or more than 60 days after the date of publication~~)~~, persons may file with the department written objections to the application.

~~(3)~~(4) The requirements of subsections ~~(1)~~ (2) and ~~(2)~~ (3) do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

Section 3. Section 85-2-308, MCA, is amended to read:

"85-2-308. Objections. (1) (a) An objection to an application under this chapter must be filed by the date specified by the department under 85-2-307~~(2)~~(3).

(b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402, 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall file a correct and complete objection on a form prescribed by the department within the time period stated on the public notice associated with the application. In order to assist both applicants and objectors, the department shall adopt rules in accordance with this chapter

delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife, and recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected and to identify the point or points where the instream flow water right is measured and monitored. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.

(6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under this section and rules of the department."

Section 4. Section 85-2-309, MCA, is amended to read:

"85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit under 85-2-311 or change ~~approval~~ in appropriation right under 85-2-402 states a valid objection, it shall hold a ~~contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections, hearing pursuant to 2-4-604 for the objector to show cause before the department as to why the permit or change in appropriation right should not be granted or should be granted with additional or different conditions~~ CONTESTED CASE HEARING, PURSUANT TO TITLE 2, CHAPTER 4, PART 6, ON THE OBJECTION WITHIN 90 DAYS FROM THE DATE SET BY THE DEPARTMENT FOR THE FILING OF OBJECTIONS after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). ~~The applicant shall participate in this hearing and retains the burden of proof on the applicable criteria.~~ The department may consolidate hearings if more than one objection is filed to an application. ~~The department shall allow for discovery.~~ THE DEPARTMENT MAY EXTEND THE 90-DAY DEADLINE FOR GOOD CAUSE SHOWN OR UPON REQUEST OF THE APPLICANT AND ALL OBJECTORS. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party

to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322."

Section 5. Section 85-2-310, MCA, is amended to read:

"85-2-310. Action on application for permit or change in appropriation right. (1) (A) ~~The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.~~ If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

(B) (I) UPON REQUEST FROM THE APPLICANT, THE DEPARTMENT SHALL APPOINT A HEARING EXAMINER WHO DID NOT PARTICIPATE IN THE PRELIMINARY DETERMINATION.

(II) THE APPLICANT MAY MAKE ONLY ONE REQUEST PURSUANT TO THIS SUBSECTION (1)(B) FOR A DIFFERENT HEARING EXAMINER.

(2) A proposal to grant an application with or without conditions following a hearing on a proposal to deny the application must proceed as if the department proposed to grant the application in its preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the

applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department ~~may consider, without hearing, the proposed conditions and~~ SHALL grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

~~(2)~~(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

~~(3)~~(7) Except as provided in subsection ~~(2)~~ (6), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department~~,~~ unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

~~(4)~~(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

~~(5)~~(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;

(ii) the proposed place of use of all water applied for;

(iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection ~~(4)(c)(iii)~~ (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water; or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124."

Section 6. Section 85-2-401, MCA, is amended to read:

"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July 1, 1973. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, ~~85-2-310(4)~~ 85-2-310(8), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part 2 of this chapter.

(4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation authorization by the department."

Section 7. Section 85-2-804, MCA, is amended to read:

"85-2-804. Application -- notice -- objections -- hearing. (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion, construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the proposed means of diversion, construction, and operation are adequate;

(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(c) the applicant intends to comply with the compact.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in ~~subsections (1) and (2) of~~ 85-2-307(1) through (3).

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector to an application under subsection (1) shall state his name and address and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana are not for a beneficial use of water;

(b) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(c) the proposed means of diversion, construction, and operation are not adequate;

(d) the diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water right, a permit, or a reserved water right;

(e) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state; or

(f) the diversion and ultimate use of the water are not in the public interest of Montana.

(6) The objector to an application under subsection (2) shall state his name and address and facts tending to show that:

(a) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(b) the proposed means of diversion, construction, and operation are not adequate; or

(c) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state.

(7) If the department receives an objection to an application, it shall hold a hearing on the application within 60 days from the date set by the department for filing objections. Service of notice of the hearing must be made by certified mail upon the applicant and the objector.

(8) The hearing shall be conducted under the contested case procedures of the Montana Administrative Procedure Act in Title 2, chapter 4, part 6."

NEW SECTION. **SECTION 8. EFFECTIVE DATE.** [THIS ACT] IS EFFECTIVE JULY 1, 2009.

NEW SECTION. **SECTION 9. APPLICABILITY.** [THIS ACT] APPLIES TO APPLICATIONS RECEIVED BY THE DEPARTMENT AFTER [THE EFFECTIVE DATE OF THIS ACT].

- END -

AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-102, MCA, is amended to read:

"85-2-102. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to change an appropriation right to instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource in accordance with 85-2-436;

(d) in the case of the United States department of agriculture, forest service:

(i) instream flows and in situ use of water created in 85-20-1401, Article V; or

(ii) to change an appropriation right to divert or withdraw water under subsection (1)(a) to instream flow to protect, maintain, or enhance streamflows in accordance with 85-2-320;

(e) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(f) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(g) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(2) "Aquifer recharge" means either the controlled subsurface addition of water directly to the aquifer or

controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water.

(3) "Aquifer storage and recovery project" means a project involving the use of an aquifer to temporarily store water through various means, including but not limited to injection, surface spreading and infiltration, drain fields, or another department-approved method. The stored water may be either pumped from the injection well or other wells for beneficial use or allowed to naturally drain away for a beneficial use.

(4) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141 and of water leased under a valid lease issued by the department under 85-2-141;

(c) a use of water by the department of fish, wildlife, and parks through a change in an appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource authorized under 85-2-436;

(d) a use of water through a temporary change in appropriation right or lease to enhance instream flow to benefit the fishery resource in accordance with 85-2-408;

(e) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

(5) "Certificate" means a certificate of water right issued by the department.

(6) "Change in appropriation right" means a change in the place of diversion, the place of use, the purpose of use, or the place of storage.

(7) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

(8) "Correct and complete" means that the information required to be submitted conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information <u>for the department to begin evaluating the information</u>.

(9) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(10) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(11) "Developed spring" means any artificial opening or excavation in the ground, however made, including any physical alteration at the point of discharge regardless of whether it results in any increase in the yield of ground water, from which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

(12) "Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(13) "Ground water" means any water that is beneath the ground surface.

(14) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(15) "Mitigation" means the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water.

(16) "Municipality" means an incorporated city or town organized and incorporated under Title 7, chapter 2.

(17) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(18) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(19) (a) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water.

(b) The term does not mean a private corporation, association, or group.

(20) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(21) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(22) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(23) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(24) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(25) "Water division" means a drainage basin as defined in 3-7-102.

(26) "Water judge" means a judge as provided for in Title 3, chapter 7.

(27) "Water master" means a master as provided for in Title 3, chapter 7.

(28) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(29) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 2. Section 85-2-307, MCA, is amended to read:

"85-2-307. Notice of application for permit or change in appropriation right. (1) Upon receipt of an application for a permit or a change in appropriation right, the department shall publish notice of receipt of the application on the department's website.

~~(1)~~(2) (a) ~~Upon~~ Within 120 days of the receipt of a correct and complete application for a permit or change in appropriation right, the department:

(i) may meet informally with the applicant, the persons listed in subsection (2)(d), and persons who may claim standing pursuant to 85-2-308 to discuss the application;

(ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; and

(iii) may include conditions in the written preliminary determination to satisfy applicable criteria for issuance of a permit or change in appropriation right.

(b) If the preliminary determination proposes to grant an application, the department shall prepare a notice containing the facts pertinent to the application, including the summary of the preliminary determination and any conditions, and shall publish the notice once in a newspaper of general circulation in the area of the source.

(c) If the preliminary determination proposes to deny an application, the process provided in 85-2-310 must be followed.

~~(b)~~(d) Before the date of publication, the department shall also serve the notice by first-class mail upon:

(i) an appropriator of water or applicant for or holder of a permit who, according to the records of the department, may be affected by the proposed appropriation;

(ii) any purchaser under contract for deed, as defined in 70-20-115, of property that, according to the records of the department, may be affected by the proposed appropriation; and

(iii) any public agency that has reserved waters in the source under 85-2-316.

~~(c)~~(e) The department may, in its discretion, also serve notice upon any state agency or other person the department feels may be interested in or affected by the proposed appropriation.

~~(d)~~(f) The department shall file in its records proof of service by affidavit of the publisher in the case of notice by publication and by its own affidavit in the case of service by mail.

~~(2)~~(3) The notice ~~shall~~ must state that by a date set by the department, ~~(~~not less than 15 days or more than 60 days after the date of publication~~)~~, persons may file with the department written objections to the application.

~~(3)~~(4) The requirements of subsections ~~(1)~~ (2) and ~~(2)~~ (3) do not apply if the department finds, on the basis of information reasonably available to it, that the appropriation as proposed in the application will not adversely affect the rights of other persons."

Section 3. Section 85-2-308, MCA, is amended to read:

"85-2-308. Objections. (1) (a) An objection to an application under this chapter must be filed by the date specified by the department under 85-2-307~~(2)~~(3).

(b) The objection to an application for a permit must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-311 are not met.

(2) For an application for a change in appropriation rights, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-320, if applicable, 85-2-402, 85-2-407, 85-2-408, and 85-2-436, if applicable, are not met.

(3) A person has standing to file an objection under this section if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.

(4) For an application for a reservation of water, the objection must state the name and address of the objector and facts indicating that one or more of the criteria in 85-2-316 are not met.

(5) An objector to an application under this chapter shall file a correct and complete objection on a form

prescribed by the department within the time period stated on the public notice associated with the application. In order to assist both applicants and objectors, the department shall adopt rules in accordance with this chapter delineating the components of a correct and complete objection. For instream flow water rights for fish, wildlife, and recreation, the rules must require the objector to describe the reach or portion of the reach of the stream or river subject to the instream flow water right and the beneficial use that is adversely affected and to identify the point or points where the instream flow water right is measured and monitored. The department shall notify the objector of any defects in an objection. An objection not corrected or completed within 15 days from the date of notification of the defects is terminated.

(6) An objection is valid if the objector has standing pursuant to subsection (3), has filed a correct and complete objection within the prescribed time period, and has stated the applicable information required under this section and rules of the department."

Section 4. Section 85-2-309, MCA, is amended to read:

"85-2-309. Hearings on objections -- jurisdiction. (1) If the department determines that an objection to an application for a permit under 85-2-311 or change ~~approval~~ in appropriation right under 85-2-402 states a valid objection, it shall hold a ~~contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 60 days from the date set by the department for the filing of objections,~~ contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 90 days from the date set by the department for the filing of objections after serving notice of the hearing by first-class mail upon the applicant and the objector, unless the department certifies an issue to the district court for determination by a water judge under subsection (2). The department may consolidate hearings if more than one objection is filed to an application. The department may extend the 90-day deadline for good cause shown or upon request of the applicant and all objectors. The department shall file in its records proof of the service by affidavit of the department.

(2) (a) At any time prior to commencement or before the conclusion of a hearing as provided in subsection (1), the department may in its discretion certify to the district court all factual and legal issues involving the adjudication or determination of the water rights at issue in the hearing, including but not limited to issues of abandonment, quantification, or relative priority dates. Certified controversies must be given priority by a water judge over all other adjudication matters.

(b) If the department fails to certify an issue as provided in this section after a timely request by a party to the hearing, the department shall include its denial to certify as part of the record of the hearing.

(c) Upon determination of the issues certified to it by the department, the court shall remand the matter to the department for further processing of the application under this chapter.

(3) Subsection (2) does not apply in the case of a matter considered at a hearing under this section pursuant to 85-2-316 or 85-2-322."

Section 5. Section 85-2-310, MCA, is amended to read:

"85-2-310. Action on application for permit or change in appropriation right. (1) (a) ~~The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.~~ If the department proposes to deny an application for a permit or a change in appropriation right under 85-2-307, unless the applicant withdraws the application, the department shall hold a hearing pursuant to 2-4-604 after serving notice of the hearing by first-class mail upon the applicant for the applicant to show cause by a preponderance of the evidence as to why the permit or change in appropriation right should not be denied.

(b) (i) Upon request from the applicant, the department shall appoint a hearing examiner who did not participate in the preliminary determination.

(ii) The applicant may make only one request pursuant to this subsection (1)(b) for a different hearing examiner.

(2) A proposal to grant an application with or without conditions following a hearing on a proposal to deny the application must proceed as if the department proposed to grant the application in its preliminary determination pursuant to 85-2-307.

(3) If valid objections are not received on an application or if valid objections are unconditionally withdrawn and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right as proposed in the preliminary determination pursuant to 85-2-307.

(4) If valid objections to an application are received and withdrawn with conditions stipulated with the

applicant and the department preliminarily determined to grant the permit or change in appropriation right, the department shall grant the permit or change in appropriation right subject to conditions as necessary to satisfy applicable criteria.

(5) The department shall deny or grant with or without conditions a permit under 85-2-311 or a change in appropriation right under 85-2-402 within 90 days after the administrative record is closed.

~~(2)~~(6) If an application is to appropriate water with a point of diversion, conveyance, or place of use on national forest system lands, any application approved by the department is subject to any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of the water applied for and any terms, conditions, and limitations related to the use of water contained in any special use authorization required by federal law.

~~(3)~~(7) Except as provided in subsection ~~(2)~~ (6), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department~~,~~ unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

~~(4)~~(8) The department may cease action upon an application for a permit or change in appropriation right and return it to the applicant when it finds that the application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use. An application returned for either of these reasons must be accompanied by a statement of the reasons for which it was returned, and for a permit application there is not a right to a priority date based upon the filing of the application. Returning an application pursuant to this subsection is a final decision of the department.

~~(5)~~(9) For all applications filed after July 1, 1973, the department shall find that an application is not in good faith or does not show a bona fide intent to appropriate water for a beneficial use if:

(a) an application is not corrected and completed as required by 85-2-302;

(b) the appropriate filing fee is not paid;

(c) the application does not document:

(i) a beneficial use of water;

(ii) the proposed place of use of all water applied for;

(iii) for an appropriation of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more, a detailed project plan describing when and how much water will be put to a beneficial use. The project plan must include a reasonable timeline for the completion of the project and the actual application of the water to a beneficial use.

(iv) for appropriations not covered in subsection ~~(4)(c)(iii)~~ (9)(c)(iii), a general project plan stating when and how much water will be put to a beneficial use; and

(v) if the water applied for is to be appropriated above that which will be used solely by the applicant or if it will be marketed by the applicant to other users, information detailing:

(A) each person who will use the water and the amount of water each person will use;

(B) the proposed place of use of all water by each person;

(C) the nature of the relationship between the applicant and each person using the water; and

(D) each firm contractual agreement for the specified amount of water for each person using the water; or

(d) the appropriate environmental impact statement costs or fees, if any, are not paid as required by 85-2-124."

Section 6. Section 85-2-401, MCA, is amended to read:

"85-2-401. Priority -- recognition and confirmation of changes in appropriations issued after July 1, 1973. (1) As between appropriators, the first in time is the first in right. Priority of appropriation does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.

(2) Priority of appropriation made under this chapter dates from the filing of an application for a permit with the department, except as otherwise provided in 85-2-301 through 85-2-303, 85-2-306, ~~85-2-310(4)~~ 85-2-310(8), and 85-2-313.

(3) Priority of appropriation perfected before July 1, 1973, must be determined as provided in part 2 of this chapter.

(4) All changes in appropriation rights actions of the department after July 1, 1973, are recognized and

confirmed subject to this part and any terms, conditions, and limitations placed on a change in appropriation authorization by the department."

Section 7. Section 85-2-804, MCA, is amended to read:

"85-2-804. Application -- notice -- objections -- hearing. (1) Any appropriator proposing to divert from the basin water allocated to Montana under the terms of the compact or divert from the basin unallocated compact water within Montana shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the diversion and ultimate use of the water in Montana is for a beneficial use of water;

(b) the diversion and ultimate use of water will not adversely affect the water rights of other persons;

(c) the proposed means of diversion, construction, and operation are adequate;

(d) the diversion and ultimate use will not interfere unreasonably with other planned uses or developments for which a water right has been established or a permit has been issued or for which water has been reserved;

(e) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states;

(f) the diversion and ultimate use of the water are in the public interest of Montana; and

(g) the applicant intends to comply with the laws of the signatory states to the compact.

(2) Any appropriator proposing to divert from the basin water allocated to North Dakota or Wyoming under the terms of the compact or divert from the basin unallocated compact water within North Dakota or Wyoming shall file an application with the department. The application must state the name and address of the applicant and facts tending to show that:

(a) the proposed means of diversion, construction, and operation are adequate;

(b) the diversion and ultimate use of the water will not exceed the allocated share under the compact of any of the signatory states; and

(c) the applicant intends to comply with the compact.

(3) Notice of the proposed diversion must be given by the department in the same manner as provided in ~~subsections (1) and (2) of~~ 85-2-307(1) through (3).

(4) An objection to an application must be filed by the date specified by the department in the notice.

(5) The objector to an application under subsection (1) shall state his name and address and facts

tending to show that:

(a) the diversion and ultimate use of the water in Montana are not for a beneficial use of water;

(b) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(c) the proposed means of diversion, construction, and operation are not adequate;

(d) the diversion and ultimate use will interfere unreasonably with the objector's planned uses or development for which the objector has a water right, a permit, or a reserved water right;

(e) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state; or

(f) the diversion and ultimate use of the water are not in the public interest of Montana.

(6) The objector to an application under subsection (2) shall state his name and address and facts tending to show that:

(a) the property, rights, or interests of the objector would be adversely affected by the proposed diversion or ultimate use of the water;

(b) the proposed means of diversion, construction, and operation are not adequate; or

(c) the diversion and ultimate use of the water will exceed the allocated share under the compact of any signatory state.

(7) If the department receives an objection to an application, it shall hold a hearing on the application within 60 days from the date set by the department for filing objections. Service of notice of the hearing must be made by certified mail upon the applicant and the objector.

(8) The hearing shall be conducted under the contested case procedures of the Montana Administrative Procedure Act in Title 2, chapter 4, part 6."

Section 8. Effective date. [This act] is effective July 1, 2009.

Section 9. Applicability. [This act] applies to applications received by the department after [the effective date of this act].

- END -

I hereby certify that the within bill,
HB 0040, originated in the House.

Chief Clerk of the House

Speaker of the House

Signed this _____ day
of _____, 2019.

President of the Senate

Signed this _____ day
of _____, 2019.

HOUSE BILL NO. 40

INTRODUCED BY J. COHENOUR

BY REQUEST OF THE WATER POLICY COMMITTEE

AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE.

GOVERNOR'S OFFICE OF
BUDGET AND PROGRAM PLANNING

Fiscal Note 2011 Biennium

Bill #	HB0040	**Title:**	Revise water right permit process
Primary Sponsor:	Cohenour, Jill	**Status:**	Select status

☐ Significant Local Gov Impact ☐ Needs to be included in HB 2 ☐ Technical Concerns

☐ Included in the Executive Budget ☐ Significant Long-Term Impacts ☐ Dedicated Revenue Form Attached

FISCAL SUMMARY

	FY 2010 Difference	FY 2011 Difference	FY 2012 Difference	FY 2013 Difference
Expenditures:				
General Fund	$0	$0	$0	$0
Revenue:				
General Fund	$0	$0	$0	$0
Net Impact-General Fund Balance	$0	$0	$0	$0

FISCAL ANALYSIS

Assumptions:

This bill will have no known fiscal impact on the state.

Sponsor's Initials	*Date*	*Budget Director's Initials*	*Date*

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
61st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Vice-Chairman Hendrick, on January 21, 2009 at 3:00 P.M., in Room 472 Capitol.

ROLL CALL

Members Present:

Rep. Gordon R. Hendrick, Vice Chairman (R)
Rep. JP Pomnichowski, Vice Chairman (D)
Rep. Tony Belcourt (D)
Rep. Gerald Bennett (R)
Rep. Anders Blewett (D)
Rep. Jill Cohenour (D)
Rep. Sue Dickenson (D)
Rep. Betsy Hands (D)
Rep. Brian Hoven (R)
Rep. Tom McGillvray (R)
Rep. Mike Menahan (D)
Rep. Scott Mendenhall (R)
Rep. Mike Miller (R)
Rep. Michele Reinhart (D)
Rep. Kendall Van Dyk (D)
Rep. Chas Vincent (R)
Rep. Wendy Warburton (R)

Members Excused: Rep. Mike Milburn, Chairman (R)

Members Absent: None

Staff Present: Shirley Chovanak, Committee Secretary
Joe Kolman, Legislative Branch

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: HJR 1, 1/15/2009; HB 40, 1/14/2009; HB 153, 1/14/2009

Executive Action: None

00:00:01 Vice Chairman Hendrick

HEARING ON HB 153

Opening Statement by Sponsor:

00:02:10 Rep. Betsy Hands (D), HD 99, opened the hearing on HB 153, Revise the Voluntary Cleanup and Redevelopment Act (VCRA).
EXHIBIT(nah14a01)

Proponents' Testimony:

00:08:54 Sandy Olson, Department of Environment Quality (DEQ)
EXHIBIT(nah14a02)

Opponents' Testimony:

00:14:36 Brett Doney, Great Falls Development Authority
00:18:47 Darrell James, City of Missoula
00:21:53 Chad Delong, Missoula Area Economic Organization

Informational Testimony:

00:23:46 Lisa Blanford, Performance, Legislative Audit Division (LAD)
EXHIBIT(nah14a03)

Questions from Committee Members and Responses:

00:24:43 Rep. Reinhart
00:24:55 Ms. Blanford
00:25:13 Rep. Reinhart
00:25:28 Mr. Delong
00:26:07 Rep. Reinhart
00:26:13 Mr. Delong
00:26:22 Rep. Reinhart
00:26:35 Mr. Doney
00:26:50 Ms. Olson
00:27:59 Mr. Doney
00:28:07 Rep. Reinhart
00:28:13 Mr. Doney
00:28:39 Rep. Reinhart
00:28:46 Ms. Olson
00:30:19 Rep. Reinhart
00:30:28 Ms. Olson
00:31:50 Rep. Reinhart

00:32:03 Ms. Olson
00:34:50 Rep. Dickenson
00:35:19 Ms. Olson
00:35:25 Rep. Dickenson
00:36:06 Ms. Olson
00:36:44 Rep. Dickenson
00:37:13 Ms. Olson
00:39:19 Rep. Belcourt
00:39:39 Ms. Olson
00:39:50 Vice-Chairman Hendrick
00:40:49 Denise Martin, Site Response Section, DEQ
00:42:10 Rep. Belcourt
00:42:26 Mr. Doney
00:42:50 Rep. Vincent
00:43:10 Ms. Olson
00:43:43 Rep. Vincent
00:44:19 Ms. Olson
00:44:41 Rep. Vincent
00:45:07 Mr. Delong
00:47:19 Rep. Vincent
00:47:44 Mr. Delong
00:48:35 Rep. Vincent
00:48:43 Mr. Delong
00:48:50 Rep. Cohenour
00:49:35 Mr. Delong
00:50:43 Rep. Cohenour
00:50:50 Mr. Delong
00:51:39 Rep. Cohenour
00:52:24 Rep. Hands
00:53:19 Rep. Miller
00:53:37 Ms. Olson
00:53:56 Rep. Miller
00:53:59 Ms. Olson
00:54:06 Rep. Miller
00:54:29 Ms. Olson
00:54:54 Rep. Hoven
00:55:24 Rep. Hands
00:56:50 Rep. Hoven
00:56:60 Rep. Hands
00:57:06 Ms. Olson
00:57:36 Rep. Warburton
00:58:24 Ms. Olson
00:58:51 Rep. Warburton
00:59:18 Ms. Olson
00:59:53 Rep. Warburton
01:00:05 Ms. Martin
01:01:50 Rep. Warburton
01:02:01 Ms. Martin
01:03:00 Vice-Chairman Hendrick
01:03:22 Rep. Warburton

01:03:43 Ms. Martin
01:04:26 Rep. Vincent
01:05:21 Ms. Martin
01:05:54 Rep. Vincent
01:06:34 Ms. Martin
01:07:47 Vice-Chairman Hendrick
01:08:28 Rep. Vincent
01:08:42 Rep. Pomnichowski
01:09:18 Ms. Martin
01:10:01 Rep. Pomnichowski
01:10:41 Ms. Martin

Closing by Sponsor:

01:10:52 Rep. Hands

HEARING ON HB 40

Opening Statement by Sponsor:

1:20:17 Rep. Jill Cohenour (D), HD 78, opened the hearing on HB 40, Revise water right permit process.
EXHIBIT(nah14a04)

Proponents' Testimony:

01:22:00 Mary Sexton, Director, Department of Natural Resources and Conservation (DNRC)
EXHIBIT(nah14a05)
01:24:00 John Tubbs, Administrator, Water Resources Division, DNRC
EXHIBIT(nah14a06)
01:32:53 Abigail St. Lawrence, Montana Association of Realtors
01:36:17 Mike Murphy, Montana Water Resources Association
01:37:22 Dustin Stuart, Montana Building Industry Association (MBIA)
EXHIBIT(nah14a07)
01:37:54 Holly Franz, PPL Montana, LLC
EXHIBIT(nah14a08)
01:38:31 Bill Shenk, Legal Counsel, Montana Department of Fish, Wildlife, and Parks (FWP)
EXHIBIT(nah14a09)
01:42:08 Krista Lee Evans, Association of Gallatin Agricultural Irrigators
01:42:28 Mark Aagenes, Montana Trout Unlimited
01:43:26 Nancy Schlepp, Montana Farm Bureau Federation
01:43:46 Beth Kaeding, Chair, Northern Plains Resource Council
01:44:14 David Schmidt, Water Rights Consultant

EXHIBIT(nah14a10)
01:44:53 Brianna Randall, Clark Fork Coalition
01:45:21 Brenda Lindlief Hall, Attorney, Tongue River Water Users' Association
01:46:46 Tim Davis, Montana Smart Growth Coalition
01:47:04 Vanessa Clark, Montana Water Well Drillers Association
01:48:16 Don McIntyre, Utility Solutions

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

01:49:51 Rep. Reinhart
01:50:04 Mr. Tubbs
01:51:18 Rep. Reinhart
01:51:37 Rep. Cohenour
01:53:01 Rep. Hands
01:53:26 Rep. Cohenour
01:53:42 Rep. Mendenhall
01:54:16 Mr. Tubbs
01:55:12 Rep. Hoven

Closing by Sponsor:

01:55:39 Rep. Cohenour

HEARING ON HJ 1

Opening Statement by Sponsor:

01:56:47 Rep. Julie French (D), HD 36, opened the hearing on HJ 1, Interim study of biomass.

Proponents' Testimony:

02:00:20 Ms. Sexton
02:02:58 Bronn Devlon, Northwestern Energy
02:03:27 Joel Clairmont, Deputy Director, Montana Department of Agriculture
02:03:54 Chris Christians, Montana Farmers Union

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

02:05:35 Rep. Hands
02:06:15 Rep. French
02:07:07 Rep. Hands
02:07:33 Rep. French
02:08:26 Rep. Mendenhall
02:09:49 Rep. French
02:11:53 Rep. Mendenhall
02:12:18 Rep. French
02:13:03 Rep. Hoven
02:13:36 Rep. McGillvray
02:14:02 Mr. Devlon
02:15:39 Rep. McGillvray
02:15:47 Mr. Devlon
02:17:08 Rep. McGillvray
02:17:18 Mr. Devlon
02:18:32 Rep. Dickenson
02:19:01 Ms. Sexton
02:19:37 Rep. Vincent
02:20:53 Rep. French
02:22:20 Rep. Hendrick
02:23:15 Rep. French

Closing by Sponsor:

02:23:56 Rep. French

ADJOURNMENT

02:25:11 Adjournment

_____
SHIRLEY CHOVANAK, Secretary

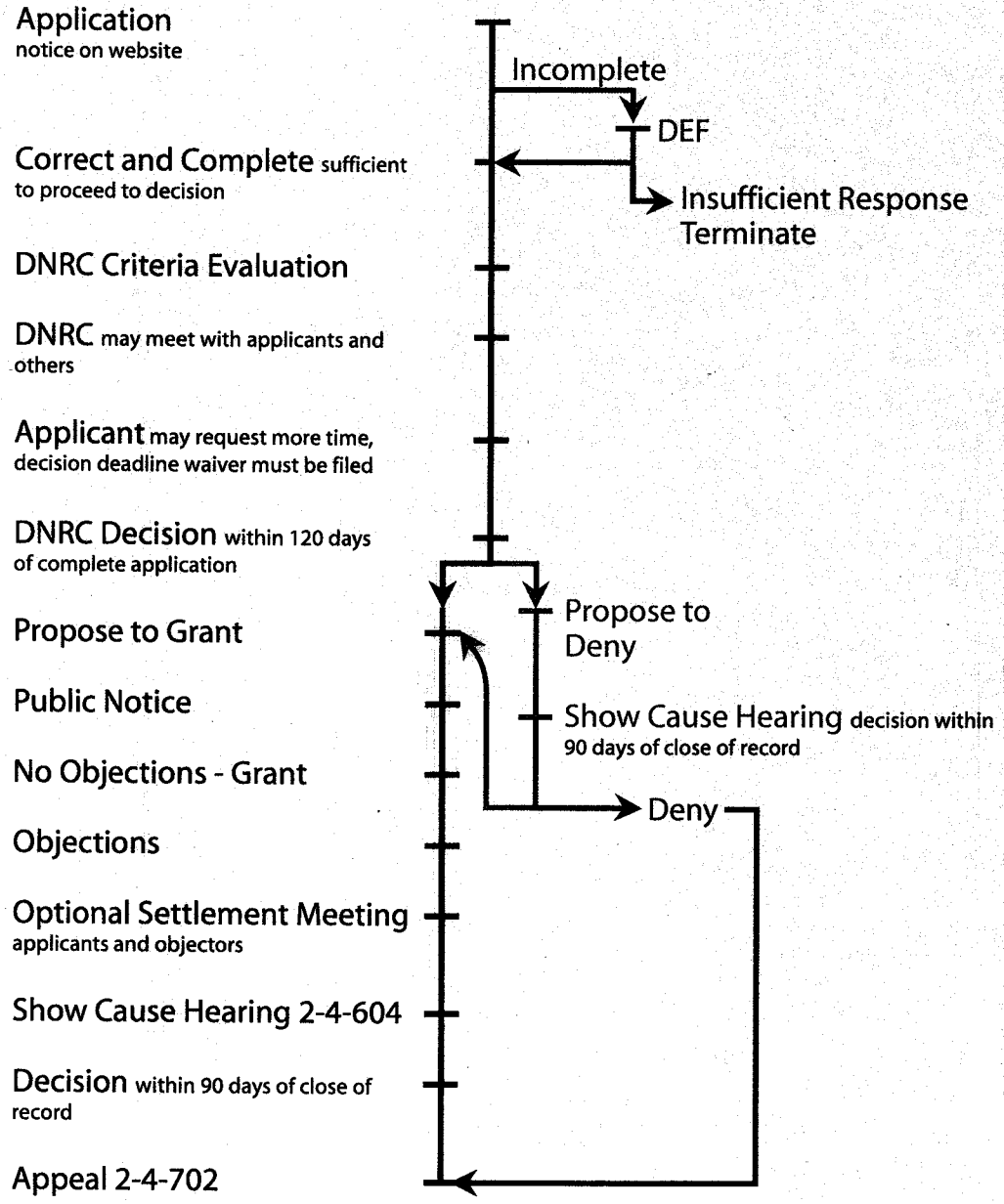
sc

Additional Documents:

EXHIBIT(nah14aad.pdf)

EXHIBIT 5
DATE 1/21/09
HB 40

DNRC Proposed Application Process


Application
notice on website
Incomplete
DEF
Correct and Complete sufficient to proceed to decision
Insufficient Response Terminate
DNRC Criteria Evaluation
DNRC may meet with applicants and others
Applicant may request more time, decision deadline waiver must be filed
DNRC Decision within 120 days of complete application
Propose to Deny
Propose to Grant
Public Notice
Show Cause Hearing decision within 90 days of close of record
No Objections - Grant
Deny
Objections
Optional Settlement Meeting
applicants and objectors
Show Cause Hearing 2-4-604
Decision within 90 days of close of record
Appeal 2-4-702

Terri McLaughlin, Chief WRB, DNRC
444-6631

DNRC Water Rights Bureau - HB 40
January 2009

EXHIBIT 6
DATE 1/21/09
HB 40

TESTIMONY IN SUPPORT OF HOUSE BILL 40
JOHN TUBBS, ADMINISTRATOR, WATER RESOURCES DIVISION
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and present testimony in support of this important legislation. My name is John Tubbs, and I am the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation (Department). My Division is charged with implementing the Montana Water Use Act.

The Water Use Act was passed in 1973. Since its passage, one cannot obtain a water right (permit) or change an existing water right in Montana without completing the process set forth in the Act before the Department. The Water Use Act reflects the important protections and considerations of Article IX of the 1972 Montana Constitution. Specifically, these are the recognition and protection of existing water rights (pre-1973) while allowing for the appropriation of water for the use of the people of Montana.

The Legislation before you represents the most significant revision to the Water Use Act since its passage. The impetus for this legislation is the concern of members of the public participating in the process established by Act. As explained further below, the current structure of the Act allows the Department to express its views on the viability of an application for a permit or change in existing water right only at the conclusion of the administrative process. Applicants are frustrated to learn the Department's view that an application should be denied at the end of the process after substantial investment of time and resources. The Department is likewise frustrated by statutory constraints that limit its ability to advise applicants of its position earlier in the process. Key provisions of HB 40 allow the Department to advise applicants early in the process of its position as to whether an application should be granted or denied and also to allow for open and frank communication with applicants prior to making that decision. Importantly, the Bill also provides that the resources of current water right holders need not be expended until such time as it appears that an application for a permit or change meets the requisite criteria in the view of the Department.

CURRENT PROCESS

The current process is generally as follows. To obtain a water right or change an existing water right, an applicant must affirmatively prove to the Department the criteria in §85-2-311, MCA and §85-2-402 MCA, respectively, before a permit or change authorization will be granted. An applicant must file an application. An application is then reviewed by the Department to determine whether there is sufficient information for the application to move forward in processing, i.e. did the applicant provide sufficient information to warrant the Department's investment of time and resources to evaluate the application. This is known as the "correct and complete" determination under §85-2-302, MCA. If there is insufficient information to move forward and the applicant fails to provide sufficient information after notice, the application is terminated.

Once an application correct and complete, it must be noticed to the public. Others are given the opportunity to object to an application. §§85-2-308, -309, MCA. If valid objections are filed, the Department shall hold a hearing on the objections under the contested-case provisions (mini-trial) of the Montana Administrative Procedure Act (MAPA), Title 2, Chapter 4, Part 6, MCA. A Department hearing examiner is appointed to conduct the proceeding. After the hearing, the Department issues a final decision granting or denying the application. Decisions from the hearing examiner are subject to review in the district court under MAPA, Title 2, Chapter 4, Part 7, MCA. If there are no objections or if objections are resolved, the application is evaluated by the Department's Regional Office to which it was submitted for compliance with the applicable criteria. The Department then either grants the application or issues a statement of opinion under §85-2-310(3) explaining why it has denied the application. When objectors settle their objections with an applicant, the Department (either the Regional Office or the hearing examiner if other objectors remain) reviews the settlement conditions. The Department is not bound by the settlement but can accept those conditions that relate to making sure the criteria under §§85-2-311 and -402, MCA are met. Mont. Admin. R. 36.12.207. An applicant issued a statement of opinion may request a hearing before the Department as to why the Department's statement of opinion is in error. If no hearing is held, the statement of opinion becomes final. If a hearing is requested, it is held and a final decision by the Department is issued. This hearing is held as a show cause hearing before the Department where the applicant can present any relevant testimony and evidence as to why the statement of opinion is in error and the application should be granted. The final decision of the Department is then appealable to the district court just as a decision in a contested case with objectors.

In either case, the Department's position that an applicant has failed to prove the requisite criteria may not be known until an applicant has invested substantial resources in a contested case proceeding or in settlement with objectors. This bill proposes to remedy that situation.

PROPOSED PROCESS

The process proposed in this Bill is generally as follows. The process is the same through the correct and complete determination, with the exception that the Department notices all applications received on its website. After the application is determined correct and complete, the Department now has authority to meet informally with the applicant and others to have frank discussions about the merits of its application and possible conditions, if any, that might allow granting an application. The Department has 120 days after the correct and complete determination to issue a preliminary determination to grant or deny an application. This preliminary determination would contain findings of fact and conclusions of law to support the Department's determination. Only if the Department preliminarily determines that the applicant has proven the requisite criteria, is the application noticed to the public. The public notice would be as it is currently, except that it would also include a summary of the Department's preliminary determination. Persons could object to the application as in the current process. However, because the Department has already preliminarily determined

that the applicant has met his or her burden to prove the criteria, the Department would hold a show cause hearing with the objectors and the applicant under §2-4-604, MCA. In a show cause hearing, the objector has the burden of coming forward with evidence as to why the requisite criteria are not met or why certain conditions should apply. The applicant still maintains the ultimate burden of persuasion to prove the criteria under §§85-2-311 or -402, MCA, by a preponderance of the evidence. The process, as further explained in Department rules, would allow for discovery of party positions and evidence prior to the hearing. All parties could bring forward testimony, evidence, and argument relevant to the Department's decision. The Department's role is as decision-maker and is not a party to the case and does not appear as party at the hearing. The Department's files are public information and the basis for the Department's decision would be set forth in the preliminary determination. While the Department believes that a show cause hearing is warranted due to the preliminary determination already rendered by the Department, the Department does not oppose a contested case proceeding in this one context. The length of the hearing process is in great measure driven by agreement of the parties as to deadlines and submissions. After the hearing, the Department hearing examiner issues a final decision reviewable by a district court in the same manner as current decisions, Title 2, Chapter 4, Part 7, MCA.

If objections are unconditionally withdrawn, the application is granted. If objections are conditionally withdrawn, the Department may consider the conditions without hearing and grant the application with such conditions as the Department determines necessary to satisfy the requisite criteria. This is consistent with the Department's discretion to condition applications under §85-2-312, MCA.

If the Department's preliminary determination is to deny the application, the application is not noticed to the public. The Department would hold a show cause hearing under §2-4-604, MCA, for the applicant to show cause as to why the Department's decision is in error. The applicant could submit all evidence, testimony, and argument relevant to the Department's preliminary determination. One must remember that a preliminary determination to deny would be issued only after the Department and the applicant have had an opportunity to discuss the merits of the application and what conditions, if any, might allow an application to be granted. The Department's role is as decision-maker and it is not a party to the case and does not appear as party at the show cause hearing. The Department's files are public information and the basis for the Department's decision would be set forth in the preliminary determination. Upon the request of the applicant, the Department would have designated staff experts available at the hearing for questioning by the applicant. In a show cause hearing, the applicant has the burden of coming forward with evidence as to why the Department's preliminary determination is in error and the requisite criteria are met. The applicant retains the ultimate burden of persuasion to prove the criteria under §§85-2-311 or -402, MCA, by a preponderance of the evidence. After the hearing, the Department hearing examiner issues a final decision reviewable by a district court in the same manner as current decisions, Title 2, Chapter 4, Part 7, MCA. If the Department's preliminary determination to deny the application is reversed after the show cause hearing or by a

district court on review, the application would follow that process for the preliminary determination to grant.

The Department has 90 days to issue a final decision after the administrative record is closed in both cases (hearing on proposal to grant or deny). This is a departure from the timeline in §2-4-604, MCA, which requires a decision within 7 days, and is intended to replace that deadline. Particularly in the case of a show cause hearing on a preliminary determination to deny an application, the expansion of the time for a decision provides the Department with the flexibility to have a different hearing examiner decide the show cause hearing proceeding than the regional manager issuing the preliminary determination. Under the current process with the 7-day deadline under §2-4-604, MCA, the Department must assign the employee with the most knowledge of the case, regional manager, to hold the show cause hearing for a denial. Otherwise, there is insufficient time within the current statutory timeline for a new hearing examiner to assimilate all of the information and prepare a written decision.

Expiration of any timeline in the statute does not mandate issuance of the permit or change in authorization, but only that the Department makes the necessary decision. The Department retains discretion to determine whether the requisite criteria are proven by the applicant until the statutory process is complete, subject to judicial review under MAPA.

Finally, the Bill also clarifies the definition of "correct and complete" under §85-2-102(8), MCA. This clarification confirms the Department's long-standing interpretation that the term "correct and complete" means the threshold provision of sufficient information in an application for the Department to move forward to evaluate critically the information provided for proof of the requisite criteria. The clarification is intended to address the Montana Eighteenth Judicial District Court decision in Bostwick Properties v. DNRC, Docket No. DV-08-917AX (May 2008), where the District Court held that the "correct and complete" determination was a determination by the Department that the applicant had proven the requisite criteria, ultimately mandating issuance of the permit. The term is currently found in Title 85, MCA, in eleven statutes: 1) §85-2-102 (definitions); 2) §85-2-302 (permit application); 3) §85-2-306 (exceptions to permit requirements); 4) §85-2-307 (notice of permit and change application); 5) §85-2-308 (objections to applications); 6) §85-2-316 (water reservations by government entities); 7) §85-2-360 (ground water permit applications in closed basins); 8) §85-2-363 (combined applications in closed basins); 9) §85-2-402 (change applications); 10) §85-2-436 (instream flow applications by Department of Fish Wildlife and Parks); 11) §85-20-1401 (U.S. Forest Service Compact). The term needs to be clarified because the Department does not at the correct and complete stage weigh the evidence provided by an applicant against the Department's knowledge to determine if applicant has proven the requisite criteria.

ADVANTAGES OF THE PROCESS PROPOSED IN HB40

There are numerous advantages to the process proposed in this Bill, all of which save resources for the public and improve the agency's service to the public.

First, applicants and the Department can candidly discuss applications, evidence, and possible application conditions prior to Department decisions. Applications often fail for want of additional evidence or analysis that the applicant could but did not provide in the formal process.

Second, applicants are apprised of the Department's decision early in the process prior to expenditure of resources in a hearing or for settlement with objectors. Currently, applicants learn of the Department's position on the merits of the application at or near the end of the administrative process. Applicants are frustrated by the expenditure of resources to settle or participate in a hearing only to find that the Department does not believe that he or she has proven the criteria.

Third, the public need not expend resources on applications the Department does not believe should be granted. Presently potentially affected persons must object and participate in the process, not knowing whether the Department believes that the applicant has proven the criteria.

In conclusion, after great deliberation, the Water Policy Interim Committee agreed to move forward with this Bill to address the concerns that it heard from members of the public regarding the Department's permitting and change process. The Department fully supports this Bill and believes that it will improve the agency's service to the public and save public resources. Thank you again for opportunity to weigh in on this historic legislation.

EXHIBIT 7
DATE 1/21/09
HB 40

Written Testimony – HB40

Wednesday, January 21, 2009
3:00 PM
RM 472

Chairman Milburn;

The Montana Building Industry Association (MBIA) is the Association of home builders and related industries in Montana. We have 2300 small business members, employing over 26,000 people across Montana. We have 9 local associations and build between 65 – 80% of Montana's homes each year.

We appear before the committee in support of HB40 with the amendments provided by the Montana Association of REALTORS and agreed to by the bill sponsor. HB40 is largely a result of the Water Policy Interim Committee and a consensus process that has developed within the previous few weeks.

Currently the process of applying for and being granted a new water right in a closed basin is completely unworkable. Over the past 2 years, the DNRC has not granted a single new water right through the process developed by HB831 (2005).

HB40, as amended is an attempt to improve the process. It is our belief that HB40, as amended is the first step in creating a working water right approval process.

Specifically, HB40:

- Clearly defines "correct and complete" for the purposes of a water right application.
- Creates an 120 day period in which DNRC can hold informal hearings with the applicant and potential objectors.
- Requires DNRC to make a preliminary decision to grant or deny at the end of the 120 day period.
- If the application is granted, the DNRC issues a public notice in which formal objections can be received. If objections are received the parties proceed to a contested case hearing and a final determination is made.
- If the application is preliminarily denied, the applicant has the option of holding a hearing, in front of a new hearings examiner, and make the arguments for why the preliminary determination was incorrect. If the applicant was successful, they proceed to a public notice.

We are supportive of this process because it creates a defined point in which DNRC will preliminarily grant or deny an application and outlines a defined path to a final ruling.

Additionally, we are supportive of the 120 period for "informal hearings" as we believe this will helpful in clearing up many objections before the formal process begins. However, we do wish that there was a record kept of these proceedings, as to reduce court costs if a granted water right is challenged in district court.

Finally, we believe that providing the option for an applicant to select a new hearings examiner will retain objectivity in the contested case process.

To be clear, HB40, even as amended is not a perfect solution. However, we believe it to be an improvement over the status quo – as a result we as stand before you in support of HB40.

Sincerely,

Dustin Stewart
Executive Director
Montana Building Industry Association

EXHIBIT 2
DATE 1/21/09
HB 40

Statement of PPL Montana
Before the Natural Resources Committee
Of the Montana State House
Regarding House Bill No. 40

Holly Franz
Franz & Driscoll, PLLP
21 N. Last Chance Gulch
Helena, Montana 59601
(406) 442-0005

Mr. Chairman, Members of the Committee.

My name is Holly Franz. I represent PPL Montana LLC. I've been a water lawyer and lobbyist for over 20 years now. In my law practice, I represent a variety of clients including hydropower, ag, and municipal. I have participated in many DNRC contested case hearings representing both applicants and objectors.

HB 40 amends DNRC's administrative process for considering applications for new water rights and changes to existing water rights. HB 40 is, in part, a response to the recent *Bostwick* decision from a Bozeman district court. In *Bostwick,* the district court ruled DNRC's finding that a permit application was correct and complete was the same as finding that the criteria for the issuance of the permit had been met.

The *Bostwick* district court also ruled that the requirement in 85-2-310 that DNRC "shall grant, deny, or condition an application" within a particular time frame is mandatory, and DNRC must issue the permit without conditions if no other decision is issued before the time deadline. The *Bostwick* decision is now on appeal to the Montana Supreme Court.

Other judicial districts have ruled counter to the *Bostwick* decision, and we now have a situation where the rules applying to DNRC contested cases are different in the Bozeman area as opposed to the rest of the state. This is the time for the legislature to step in and improve DNRC's process regardless of the outcome of the *Bostwick* case.

HB 40 does this in a number of ways. First, it clarifies that a correct and complete application is only the starting point for DNRC's consideration of an application.

Second, HB 40 allows for a preliminary decision by DNRC early in the process. Under HB 40, objectors do not have to get involved in the process until the agency determines the proposal has merit. This is good for senior water right holders who now have to file one objection after another to proposals that may have no chance of succeeding. It is also good for the applicants who will know, early in the process, DNRC's concerns about their application and can work to address those concerns.

Third, HB 40 provides procedural due process for both applicants and objectors. Importantly, it maintains the burden of proof on the applicant and provides for a meaningful appeal of DNRC's determination.

Many of the stakeholders in the DNRC permitting process met last week with Rep. Cohenour and agreed on a number of amendments to improve the bill. PPL Montana supports the bill with the amendments that will be proposed by Rep. Cohenour. PPL Montana is continuing to work with other stakeholders to consider additional amendments that may improve the bill.

In my opinion, this is the most important water rights bill that you will consider this session. While administrative procedure may not appear that intriguing, it is imperative that DNRC process applications and objections in a fair manner without undue delays.

I urge the committee to favorably consider HB 40 and the amendments proposed by Rep. Cohenour.

EXHIBIT 4
DATE 1/21/09
HB 40

Amendments to House Bill No. 40
1st Reading Copy

Requested by Representative Jill Cohenour

For the House Natural Resources Committee

Prepared by Joe Kolman
January 21, 2009 (1:28pm)

1. Title, page 1, line 9.
Strike: "PROVIDING FOR" through "INFORMAL HEARING;"

2. Page 4, line 22.
Following: "applicant"
Strike: "and"
Insert: ","
Following: "(2)(d)"
Insert: ", and persons who may claim standing pursuant to 85-2-308"

3. Page 6, line 20 through line 22.
Strike: "hearing" on line 20 through "conditions" on line 22
Insert: "contested case hearing, pursuant to Title 2, chapter 4, part 6, on the objection within 90 days from the date set by the department for the filing of objections"

4. Page 6, line 24 through line 25.
Strike: "The applicant" on line 24 through "criteria." on line 25

5. Page 6, line 26.
Strike: "The department shall allow for discovery."

6. Page 7, line 11.
Following: "(1)"
Insert: "(a)"

7. Page 7.
Following: line 22
Insert: "(b)(i) Upon request from the applicant, the department shall appoint a hearing examiner who did not participate in the preliminary determination.
(ii) The applicant may make only one request pursuant to this subsection (1)(b) for a different hearing examiner."

8. Page 8, line 2.
Strike: "may consider" through "conditions and"
Insert: "shall"

- END -

EXHIBIT 9
DATE 1/21/09
HB 40

House Bill 40
January 21, 2009
Presented by Bill Schenk, Esq.
House Natural Resources Committee

Mr. Chairman and committee members, for the record I am Bill Schenk, Legal Counsel of Montana Department of Fish, Wildlife & Parks (FWP).

H.B. 40 represents a major change in the water right permitting process. FWP supports the fundamental change being proposed.

At meetings of the Water Policy Interim Committee, water right applicants, and those who represent them repeatedly expressed frustration with the application process, not only because it takes a long time, but because it is unpredictable. Applicants can invest a lot of time and money in an application and still be told no. This bill will help because applicants will know much earlier if they will have a difficult time getting a permit.

H.B. 40 first clarifies that a correct and complete application is one that contains enough information for the DNRC to begin evaluating it, not to determine whether the application meets the water right permit or change criteria.

H.B. 40 also makes it clear that DNRC has the authority to communicate with applicants, evaluate evidence submitted at an early stage and communicate shortfalls in evidence earlier in the process. This is done by creating a new step in the process that requires a "preliminary determination" prior to the application being sent to the larger public for review. If the preliminary determination results in a recommendation to deny the permit, the applicant may appeal that decision to the department. DNRC may then affirm its preliminary determination or propose to grant the permit. Either way the Department proposes to grant a permit, whether before or after a hearing, a notice of the proposal must be published and other parties then have a chance to object.

The problem is that 90 days is not enough to conduct meaningful discovery, line up experts etc. 120 days would be more appropriate to get through the process. But more importantly, FWP feels that DNRC needs the statutory authority to extend the time limit.

Applicants want a faster permit process and predictability. That's what this bill is about, and FWP supports that. But if an applicant drags its feet leading up to hearing - by being slow to answer discovery or if there's trouble scheduling an expert for deposition, the objector may be forced into a hearing without necessary information. I don't think this is common but it certainly could happen. What is common is for parties to work toward a settlement and ask for more time to work it out. DNRC is usually accommodating if all parties agree, but it isn't clear in the statute that DNRC has the authority to do so. The statute should acknowledge that DNRC may extend the deadline.

FWP proposes that one sentence be added to 85-2-309(1) that states: "The Department may extend the 90 (120) day deadline for good cause shown or upon request of applicant and all objectors." "Good cause" would cover an extension where one party has to ask for a motion to compel discovery, or a change in attorney etc. "Request of all parties" would cover an extension for parties to continue to work toward settlement.

EXHIBIT 10
DATE 2/21/09
HB 40

January 21, 2009

House Natural Resource Committee

Testimony in support of and proposed amendments to HB 40.

WRSI Comments to HB 40

HB 40 in and of itself is a good start. It does not repair the water rights permit or change process. In a broader sense, WRSI is concerned with the diminution of existing water rights when the DNRC imposes volumes where none existed in the underlying water right. The volume limitations are supposedly calculated by determining the historic beneficial use of water. However, a water user may often have a water right diminished simply because historic (pre-1973) evidence of how water was used simply does not exist.

From a policy perspective, continued reductions in volume beneficially used, particularly in closed basins, short-change the State's ability to use and/or change these waters within the State. If this trend is allowed to continue to its logical conclusion, instream flows will be enhanced, but there will be a net loss in available water and Montana will become a net exporter of its historically used water to downstream States. As a result, there will be few, if any, options left to adequately address future water needs and the inevitable changes in water use patterns.

To accomplish this, amendments to HB 40 should be made which include:

(4) "Beneficial use", unless otherwise provided means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power and recreational uses.

(i) use, is defined as the amount which is reasonably necessary for such purposes and based upon the amount actually needed;

(ii) historical beneficial use, is defined as the amount which has been determined by the Montana Water Court;

(New Section) "Historical Irrigation Consumptive Use" means the maximum amount of water used per the historically irrigated acres determined by the Montana Water Court or the Supreme Court Claims Examination Rules and calculated utilizing a scientific determination of evapotranspiration calculations.

Specific Comments on HB 40

Page 2 Line 27 (8) for the department to begin evaluating the information.

The question is, how does the department determine there is substantial credible evidence without evaluating the application? A ninety-day time limit should be imposed for making the determination of correct and complete. The bill does not solve the application processing problems of time limits and arbitrary decision-making by the DNRC..

Page 4 Line 18 What is the purpose in publishing a notice of receipt on the DNRC website? Seems like a waste of time and resources.

Page 4 Line 24 (ii) shall make a written preliminary determination as to whether or not the application satisfies the applicable criteria for issuance of a permit or change in appropriation right; The Department has unlimited time to contemplate correct and complete, which is unfair to all applicants.

Page 4 Line 28 (b) is a step in the right direction that it may ward off unnecessary objections.

The Montana Constitution affirmed and protected all existing water rights by stating in Article IX § 3:

> Water Rights. (1) All existing rights of the use of any water for any useful or beneficial purpose are hereby recognized and confirmed.

The question is how you determine the beneficial use of water and who ultimately is charged with that determination. From the beginning, water has historically been quantified by a flow rate. It was, and still is, easy to determine the rate at which one diverts water. The more difficult question is how much of that diverted water has been put to "beneficial use".

The Supreme Court grappled with this very issue in *McDonald vs. State of Montana*, Case No. 85-468, 220 Mont. 519, 722 P.2d 598 (1986). *McDonald* was filed in response to the Montana Water Court decreeing a volume quantification on direct flow irrigation rights. The Court held that:

> "... *We can also accept as true their contention that the volume of water used by irrigators up to or within the limit of their appropriation rights would vary greatly from year to year...*" (Case No. 85-468, Opinion at 6).

The Court ultimately determined that the extent of an appropriators right is that which is "reasonably necessary" for beneficial use. The Court ultimately ruled that:

> *" In so holding, we place no added burden on the owners of pre-July 1, 1973 irrigation water rights, nor do we offend the provisions of Art. IX, S 3 (11, of the 1972 Montana Constitution. Flow rate contained in*

Water Court decrees must still be expressed in cubic feet per second, as they had earlier been expressed, and in the long run the amount actually needed for beneficial use within the appropriation will be the basis, the measure and the limit of all water rights in Montana as between appropriators, and as between appropriators and others." (Case No. 85-468, Opinion at 16).

Based upon the Supreme Court's decision, the Montana Water Court no longer decrees specific volume quantifications on direct flow irrigation rights. However, the DNRC believes **it** can make such a determination and actually limits historic water rights to this amount even thought there is little or no "on the ground" evidence to support the amount of water historically used. This determination affects current water right owners who wish to change make a change to a water right and applicant for new permits for water uses.

When someone applies for a new permit under HB831, the applicant must determine how much water they will "consume" for the new proposed use. This amount must then be mitigated, by retiring or relinquishing an existing right for the same amount of water. To do this, the DNRC requires an Application to Change a Water Right. The DNRC Change Application process requires the applicant to prove the amount of the historic beneficial use of the right proposed to be changed.

Although the policy is sound, the DNRC's implementation of it is not. As stated in its rules, the DNRC refuses to be bound by either the Supreme Court or the Montana Water Court in determining the extent of a water right.

> *36.12.1902 CHANGE APPLICATION - HISTORIC USE*
> *(1) Final water court approved stipulations, master's reports, or examination information related to the water right being changed must be submitted with the application, however, this information or an abstract of a water right from the department or the Montana water court by itself is not sufficient to prove the existence or extent of the historical use.*

The DNRC has concluded the basis, measure and limit of a water right is the amount of water "consumed". The problem is how they determine this "consumptive use". The DNRC method of determining beneficial use keeps changing and the amount of water the agency will accept for historically consumed volume keeps decreasing. The acceptable figure is now less than the amount of water the NRCS has determined as necessary to produce a crop.

The DNRC has decided in the absence of proof the amount, timing and duration water applied to land over 35 years ago, they will utilize a formula based upon the average county crop production levels as of 1973 to calculate the consumptive use. The validity of these levels are questionable at best and a taking of a private property right at worst.

Therefore, to ensure compliance with the Montana Constitution and the Court decisions, the Legislature should define and give direction to the DNRC as to what is acceptable in determining historic beneficial use. The basic principles are that:

1. The DNRC should not be able to simply disregard the Montana Water Court's adjudication of existing water rights.

2. If the DNRC must determine a value for consumptive use, it should only utilize the best scientific calculations available to calculate this value and not use subjective crop production survey numbers. For instance, the NRCS has created a computer program that utilizes scientific calculations to determine irrigation requirements.
3. The DNRC's water right application processes should be examined by the Legislative auditor.

Included with this testimony is a letter that is one example of the shifting sands of DNRC policy. The application was subsequently denied as the applicant did not have the funds to proceed with a show cause hearing. The pond still exists, out of compliance, and without adverse affect. What has been accomplished?

The State of Montana owns the water for the use of its citizens. The DNRC does not own the water. The DNRC should administer a process that is fair, makes the best use of the State's resources, articulates what is needed and is objective.

WATER RIGHT SOLUTIONS, INC.

Providing Clients With A Total Water Solution

September 9, 2008

John Tubbs, Administrator WRD
Jan Langel, Operations Manager
P.O. Box 201601
Helena, MT 59634-1601

Dear John and Jan

This letter is in reference to Application to Change a Water Right No. 41QJ-30008614, originally filed by B&W Investment Co. LLC and now owned by Rob and Liz Dagnall.

This application was originally submitted to the Department on November 4, 2003, 4 years 8 months and 4 days prior to the date of termination. Our first letter from Mr. Beck was received March 11,2005. Our last response to DNRC was a letter to Jim Beck on May 4, 2005. The application was published with an objection deadline of May 14, 2007. On Thursday September 4, 2008, I received an e-mail from Mr. Langel that contained a Notice and Statement of Opinion, dated July 10, 2008 to deny the application. Neither the applicant or myself was noticed or given the opportunity to provide additional information or be noticed of the required hearing under 85-2-310(3)MCA

85-2-310 MCA in part;

(3) Except as provided in subsection (2), an application may not be denied or approved in a modified form or upon terms, conditions, or limitations specified by the department, unless the applicant is first granted an opportunity to be heard. If an objection is not filed against the application but the department is of the opinion that the application should be denied or approved in a modified form or upon terms, conditions, or limitations specified by it, the department shall prepare a statement of its opinion and its reasons for the opinion. The department shall serve a statement of its opinion by first-class mail upon the applicant, with a notice that the applicant may obtain a hearing by filing a request within 30 days after the notice is mailed. The notice must further state that the application will be modified in a specified manner or denied unless a hearing is requested.

The application as submitted on November 4, 2003, in my view, was correct and complete and a well documented application that complied with DNRC Policies at the time. The decision to deny was based on rules now currently in place and not the policies that were in place at the time the application was submitted.

85-2-302. Application for permit -- definition. (1) Except as provided in

1. 85-2-306 and 85-2-369, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the department.

WATER RIGHT SOLUTIONS INC.
303 Clarke Street
Helena, Montana 59601

phone: 406.443.6458
fax: 406.449.3966
email: wrsi@water-rightsolutions.com
web: www.water-rightsolutions.com

(2) The department shall adopt rules that are necessary to determine whether or not an application is correct and complete, based on the provisions applicable to issuance of a permit under this part. The rules must be adopted in compliance with Title 2, chapter 4. (3) The application must be made on a form prescribed by the department. The department shall make the forms available through its offices.

(4) (a) Subject to subsection (4)(b), the applicant shall submit a correct and complete application. The determination of whether an application is correct and complete must be based on rules adopted under subsection (2) that are in effect at the time the application is submitted:

The objection deadline was June 13, 2007. No objections were received. A full 391 days had passed since the objection deadline, until the departments untimely denial on July 10, 2008.

85-2-310. Action on application for permit or change in appropriation right. (1) The department shall grant, deny, or condition an application for a permit or change in appropriation right in whole or in part within 120 days after the last date of publication of the notice of application if no objections have been received and within 180 days if a hearing is held or objections have been received. However, in either case the time may be extended upon agreement of the applicant or, in those cases where an environmental impact statement must be prepared or in other extraordinary cases, may be extended by not more than 60 days upon order of the department. If the department orders the time extended, it shall serve a notice of the extension and the reasons for the extension by first-class mail upon the applicant and each person who has filed an objection as provided by 85-2-308.

To quote Judge Brown in Bostwick Properties, Inc. vs. Montana Department of Natural Resources and Conservation page 23, paragraph 42, last sentence The DNRC's inaction and failure to comply with the plain and unambiguous terms of the statute is in violation of a clear legal duty." Inaction and failure by the Department is in my view clearly the case in this application.

In conclusion boys, save the tax payer and the department, the time and money spent on litigation. Summon your courage, admit the error and do the right thing. Issue the above referenced Authorization as per State law.

I remain sincerely,

David M. Schmidt, Principal
Senior Water Rights Specialist

cc. Rob Dagnall
bcc

BUSINESS REPORT

MONTANA HOUSE OF REPRESENTATIVES
61st LEGISLATURE - REGULAR SESSION

HOUSE NATURAL RESOURCES COMMITTEE

Date: Wednesday, January 21, 2009 **Time:** 3:00 pm
Place: Capitol **Room:** 472

BILLS and RESOLUTIONS HEARD:
Prefix (HB, HR, HJR, SB, SR, or SJR) and number. Add Postponed (PP) when appropriate:

HJ 1 HB 40 HB 153

EXECUTIVE ACTION TAKEN:
Prefix (HB, HR, HJR, SB, SR, or SJR) and number. Enter P(pass) F(failed) DPAA (do pass as amended) BC(be concurred in) BCAA (be concurred in as amended):

COMMENTS:

REP. Mike Milburn, Chairman

Montana House of Representatives
Visitors Register

NATURAL RESOURCES HB 153 HB 1 **Date** 1/21/2009

Bill No. HB 40 **Sponsor(s)** _____

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

Name and Address	Representing	Support	Oppose	Inf.
Nana Dohlman	MT Farm Bureau	✓		
Bill Fooding	Northern Plains	✓		
John Page	Northern Plains	✓		
Mike Murphy	MWRA	X		
Ellen Engel	MWPA	X	HJ 1	
JASON TOBIN HUNTER	MHA	X	HJ 1	
David Schmidt	WITST	X	X	
Dmerc James	City of Missoula		X	
Dustin Steinbit	MBIA	HB40		
Abigail St Lawrence	MAR	X		
Chantel McCormick	DOC - Energy	X		
Ron Devlin	Northwestern Energy	X HJ1		
Alice Stanley	DNRC			✓
Don MacIntyre	Utility Solutions	HB40		
Bill Schultz	MT FWP	HB40		
Jon Bennion	MT Chamber	HB40 X		
Scott Darcy	Great Falls Chamber		HB153	
Brenda Lindlief-Hall	DEQ	X 53		
Emma Evans	AGA 1	X HB40		

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

Vanessa Clarke	MWMA	X HB40	X
Denise Martin	DEQ		
Brenda Lindlief-Hall	Tongue River Water Users Assn	X	
Holly Franz	PPL Montana	X	

Montana House of Representatives
Visitors Register

NATURAL RESOURCES + LB40 **Date** 1/21/09

Bill No. HJ 1 **Sponsor(s)** _____

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

Name and Address	Representing	Support	Oppose	Inf.
Jeri Claassen	MT Dept of Ag	X		
Brianna Randall	Clark Fork Coalition	X HB90		
Robert Lukas	DNRC	X		
Tim Davis	MSGC	X		
Mark Hayes	MTU	X		
Chris Christiansen	MFU	X		

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

MINUTES

MONTANA SENATE
61st LEGISLATURE - REGULAR SESSION

COMMITTEE ON NATURAL RESOURCES

Call to Order: Chairman Kelly Gebhardt, on March 6, 2009 at 3:00 P.M., in Room 422 Capitol

ROLL CALL

Members Present:

Sen. Kelly Gebhardt, Chairman (R)
Sen. Debby Barrett, Vice Chairman (R)
Sen. Ken (Kim) Hansen (D)
Sen. Jim Keane (D)
Sen. Donald J. Steinbeisser (R)
Sen. David E. Wanzenried (D)

Members Excused:
Sen. Aubyn Curtiss (R)
Sen. Christine Kaufmann (D)
Sen. Gary L. Perry (R)
Sen. Jim Peterson (R)
Sen. Mitch Tropila (D)

Members Absent: None

Staff Present: Lindsey Hern, Committee Secretary
Sonja Nowakowski, Legislative Branch

Audio Committees: These minutes are in outline form only. They provide a list of participants and a record of official action taken by the committee. The link to the audio recording of the meeting is available on the Legislative Branch website.

Committee Business Summary:

Hearing & Date Posted: HB 39, 3/24/2009; HB 40, 3/24/2009; HB 41, 3/24/2009

Executive Action:

HEARING ON HB 39

Opening Statement by Sponsor:

00:00:59 Rep. Jill Cohenour (D), HD 78, opened the hearing on HB 39, Revise water right enforcement laws.

00:02:07 Sen. Kaufmann and Sen. Perry came to the committee.
00:04:04 Sen. Peterson came to the committee.
00:07:42 Sen. Tropila came to the committee.

Proponents' Testimony:

00:09:32 Candace West, Chief Legal Council, Department of Natural Resources and Conservation (DNRC)
00:18:44 Sarah Bond, Montana Attorneys' Office
00:20:43 Mike Murphy, Montana Water Resource Association (MWRA)
00:21:12 Myra Shults, Montana Association of Counties (MACo)
00:21:34 Krista Lee Evens, Association of Gallatin Agricultural Irrigators (AGAI); Senior Water Rights Coalition (SrWRC); speaking on behalf of John Youngberg, Montana Farm Bureau Federation (MFBF)
00:21:56 Mark Aagenes, Montana Trout Unlimited
00:22:18 Tim Schaff, Self
00:26:52 Hannelore Sharbono, Self
00:36:26 Bob Lane, Chief Legal Council, Fish, Wildlife and Parks, (FWP)
EXHIBIT(nas50a01)

00:37:43 Holly Franz, PPL Montana
00:38:01 Colleen Coyle, Senior Water Master, Montana Water Court
EXHIBIT(nas50a02)

Opponents' Testimony:

None

Informational Testimony:

None

Questions from Committee Members and Responses:

00:39:44 Sen. Hansen
00:40:10 Rep. Cohenour
00:40:38 Ms. Coyle, Montanan Water Court
00:41:53 Sen. Hansen
00:42:08 Ms. Coyle, Montanan Water Court

00:42:37 Sen. Tropila
00:42:55 Mr. Schaff, Self

Closing by Sponsor:

00:43:17 Rep. Cohenour

00:44:07 Chairman Gebhardt

HEARING ON HB 40

Opening Statement by Sponsor:

00:44:26 Rep. Jill Cohenour (D), HD 78, opened the hearing on HB 40, Revise water right permit process.
EXHIBIT(nas50a03)

Proponents' Testimony:

00:52:38 Mary Sexton, Director, DNRC
EXHIBIT(nas50a04)

00:53:08 Sen. Steinbeisser left the committee.
00:57:21 John Tubbs, DNRC
EXHIBIT(nas50a05)

00:57:41 Abigail St. Lawrence, Montana Association of Relators (MAR)
EXHIBIT(nas50a06)

00:59:55 Ms. Franz, PPL Montana
01:00:18 Mr. Murphy, MWRA
01:00:41 Tim Davis, Montana Smart Growth Coalition (MSGC)
01:01:00 Ronda Wiggers, Montana Water Drillers Association
01:01:16 Dustin Stewart, Montana Building Industry Association (MBIA)
EXHIBIT(nas50a07)

01:01:24 Mr. Aagenes, MTU
01:01:40 Bob Lane, FWP
EXHIBIT(nas50a08)

01:02:15 Don MacIntyre, Utility Solutions
01:02:37 Ms. Evans, AGAI, SrWC
01:03:07 Ms. Shults, MACo
01:03:37 Mr. Schaff, Self

Opponents' Testimony:

None

Informational Testimony:

None

Questions from Committee Members and Responses:

01:04:42 Sen. Perry
01:04:55 Mr. MacIntyre,
01:05:05 Chairman Gebhardt
01:05:39 Mr. Tubbs DNRC
01:06:24 Chairman Gebhardt
01:06:41 Mr. Tubbs, DNRC

Closing by Sponsor:

01:07:29 Rep. Cohenour

01:08:38 Chairman Gebhardt

01:09:18 Recess

HEARING ON HB 41

Opening Statement by Sponsor:

01:17:54 Rep. Jill Cohenour (D), HD 78, opened the hearing on HB 41, Revise water quality laws for aquifer recharge or mitigation.
EXHIBIT(nas50a09)

01:19:10 Sen. Curtiss came to the committee. Sen. Barrett, Sen. Peterson and Sen. Keane did not return to the committee.

Proponents' Testimony:

01:22:42 Ms. Shults, MACo
01:23:00 Mr. Lane, FWP
EXHIBIT(nas50a10)

01:23:43 Ms. St. Lawrence, MAR
01:24:48 Mr. Aagenes MTU
01:25:14 Sen. Steinbeisser came to the committee.

Opponents' Testimony:

None

Informational Testimony:

01:25:17 Jenny Chambers, Department of Environmental Quality (DEQ)
01:25:40 Ms. West, DNRC

Questions from Committee Members and Responses:

01:26:01 Sen. Kaufmann
01:26:24 Rep. Cohenour
01:27:09 Sen. Kaufmann
01:27:27 Rep. Cohenour
01:28:05 Sen. Perry
01:28:26 Ms. St. Lawrence, MAR

Closing by Sponsor:

01:29:15 Rep. Cohenour

Additional Exhibits:

EXHIBIT(nas50a11)
EXHIBIT(nas50a12) HB 139 Heard 03/04/09

Committee Business:

01:30:34 Chairman Gebhardt
01:32:50 Sen. Wanzenried
01:32:57 Chairman Gebhardt
01:33:54 Sen. Wanzenried
01:34:11 Chairman Gebhardt
01:34:59 Sen. Wanzenried
01:35:01 Chairman Gebhardt
01:35:16 Sen. Perry
01:36:25 Sen. Steinbeisser

ADJOURNMENT

Adjournment: 4:45 P.M.

_____
Lindsey Hern, Secretary

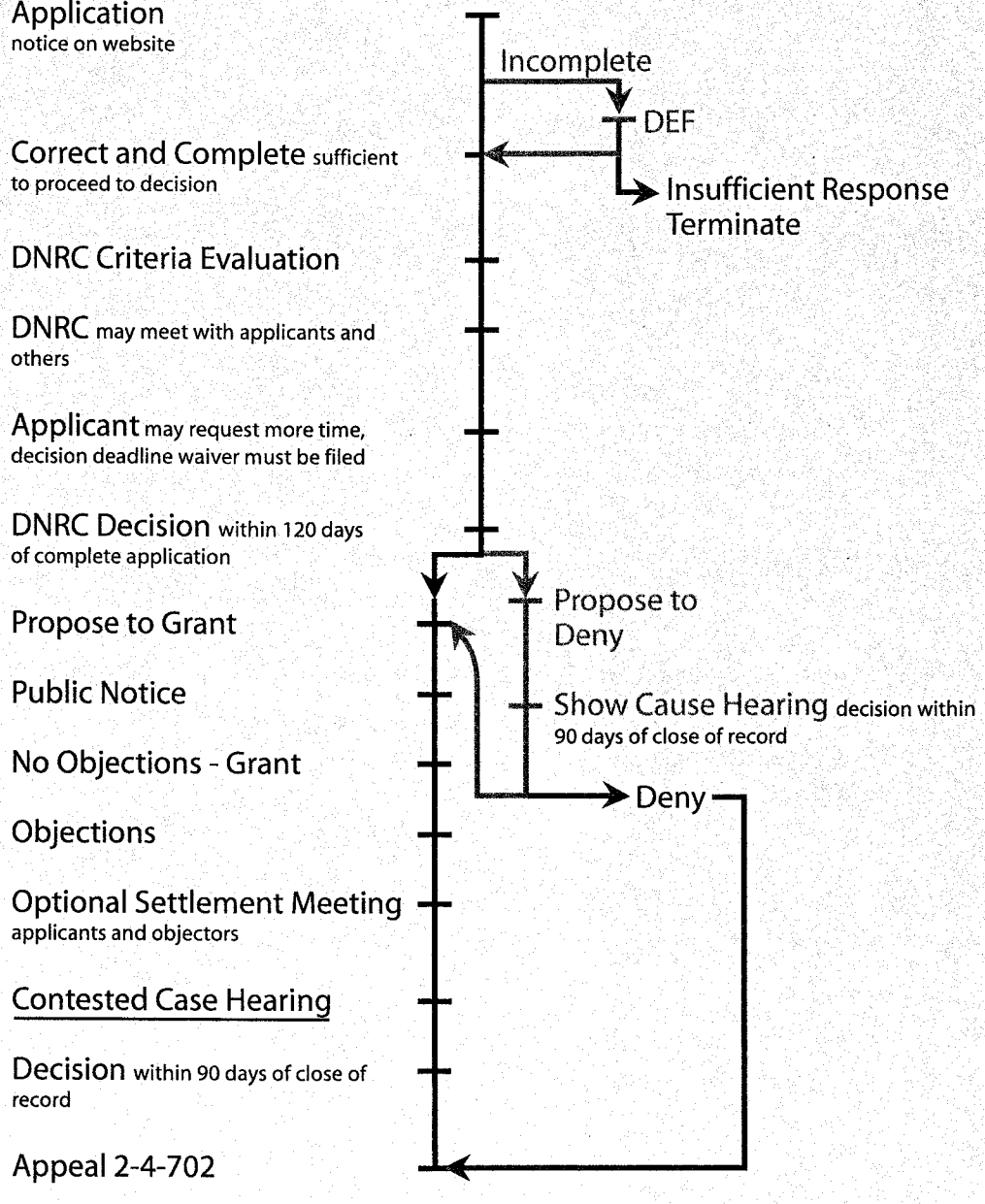
lh

Additional Documents:

EXHIBIT(nas50aad.pdf)

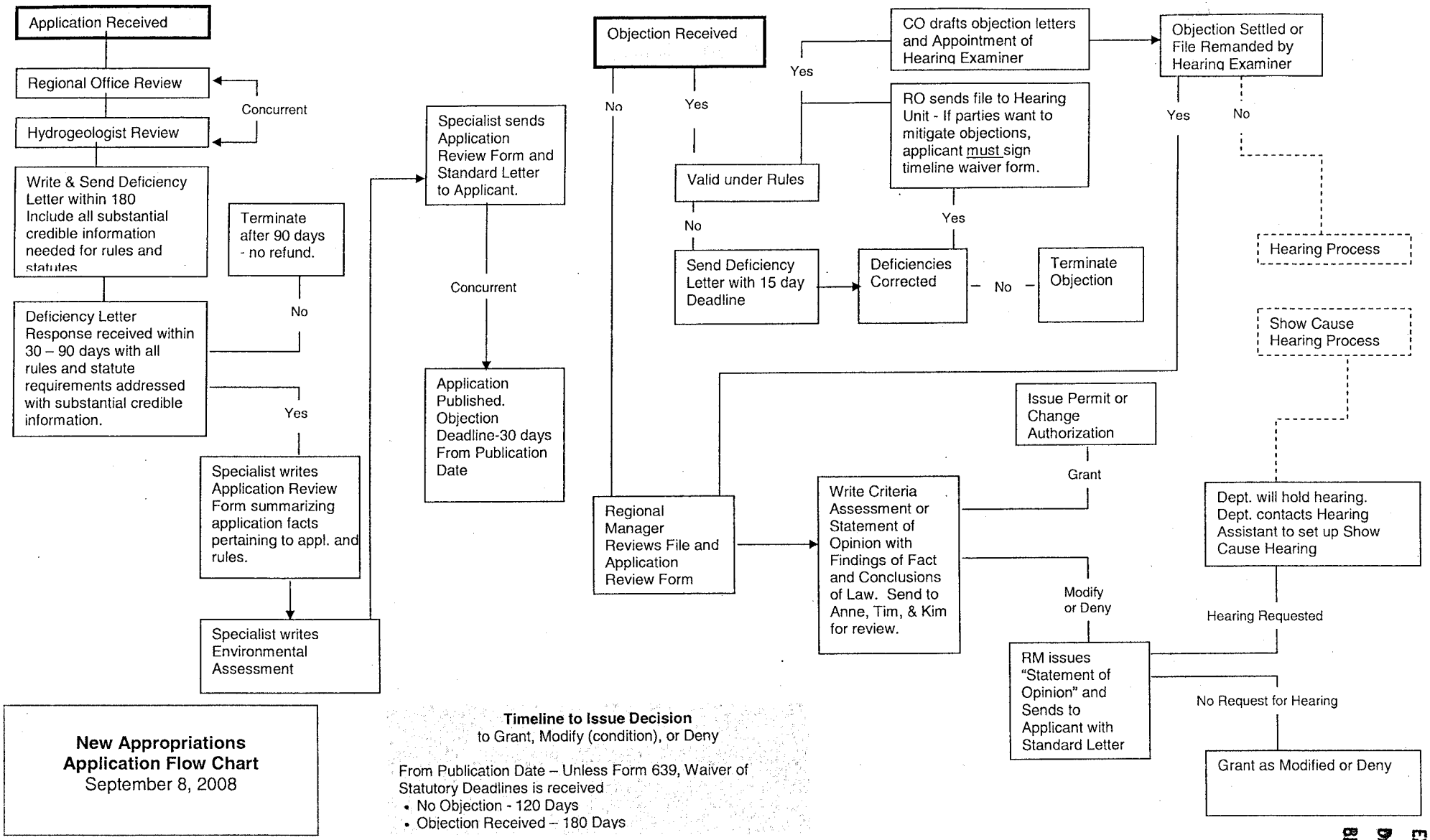
SENATE NATURAL RESOURCES
EXHIBIT NO. 3
DATE March 6, 2009
BILL NO. HB 40

HB40 as Amended (SNR)



Terri McLaughlin, Chief WRB, DNRC
444-6631

DNRC Water Rights Bureau - HB 40
January 2009


Application Received
Regional Office Review
Concurrent
Hydrogeologist Review
Write & Send Deficiency Letter within 180 Include all substantial credible information needed for rules and statutes
Terminate after 90 days - no refund.
No
Deficiency Letter Response received within 30 – 90 days with all rules and statute requirements addressed with substantial credible information.
Yes
Specialist writes Application Review Form summarizing application facts pertaining to appl. and rules.
Specialist writes Environmental Assessment
Specialist sends Application Review Form and Standard Letter to Applicant.
Concurrent
Application Published. Objection Deadline-30 days From Publication Date
Objection Received
No
Yes
Valid under Rules
No
Send Deficiency Letter with 15 day Deadline
Deficiencies Corrected
No
Terminate Objection
Yes
CO drafts objection letters and Appointment of Hearing Examiner
Yes
RO sends file to Hearing Unit - If parties want to mitigate objections, applicant must sign timeline waiver form.
Yes
Objection Settled or File Remanded by Hearing Examiner
Yes
No
Hearing Process
Show Cause Hearing Process
Regional Manager Reviews File and Application Review Form
Write Criteria Assessment or Statement of Opinion with Findings of Fact and Conclusions of Law. Send to Anne, Tim, & Kim for review.
Issue Permit or Change Authorization
Grant
Modify or Deny
RM issues "Statement of Opinion" and Sends to Applicant with Standard Letter
Dept. will hold hearing. Dept. contacts Hearing Assistant to set up Show Cause Hearing
Hearing Requested
No Request for Hearing
Grant as Modified or Deny

New Appropriations Application Flow Chart
September 8, 2008

Timeline to Issue Decision
to Grant, Modify (condition), or Deny

From Publication Date – Unless Form 639, Waiver of Statutory Deadlines is received
- No Objection - 120 Days
- Objection Received – 180 Days

SENATE NATURAL RESOURCES
EXHIBIT NO. 4
DATE March 6, 09
BILL NO. HB 40

SENATE NATURAL RESOURCES
EXHIBIT NO. 5
DATE March 6, 2009
BILL NO. HB 40

TESTIMONY IN SUPPORT OF HB 40
JOHN TUBBS, ADMINISTRATOR, WATER RESOURCES DIVISION
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and present testimony in support of this important legislation. My name is John Tubbs, and I am the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation (Department). My Division is charged with implementing the Montana Water Use Act.

The Water Use Act was passed in 1973. Since its passage, one cannot obtain a water right (permit) or change an existing water right in Montana without completing the process set forth in the Act before the Department. The Water Use Act reflects the important protections and considerations of Article IX Section 3 of the 1972 Montana Constitution. Specifically, these are the recognition and protection of existing water rights (pre-1973) while allowing for the appropriation of water for the use of the people of Montana.

The Bill before you represents the most significant revision to the Water Use Act since its passage. The impetus for this legislation is the concern of members of the public participating in the process established by Act. As explained further below, the current structure of the Act allows the Department to express its views on the viability of an application for a permit or change in existing water right only at the conclusion of the administrative process. Applicants are frustrated to learn the Department's view that an application should be denied at the end of the process after substantial investment of time and resources. The Department is likewise frustrated by statutory constraints that limit its ability to advise applicants of its position earlier in the process. Key provisions of HB 40 allow the Department to advise applicants early in the process of its position as to whether an application should be granted or denied and also to allow for open and frank communication with applicants prior to making that decision. Importantly, the Bill also provides that the resources of current water right holders need not be expended until such time as it appears that an application for a permit or change meets the requisite criteria in the view of the Department.

CURRENT PROCESS

The current process is generally as follows. To obtain a water right or change an existing water right, an applicant must affirmatively prove to the Department the criteria in §85-2-311, MCA and §85-2-402 MCA, respectively, before a permit or change authorization will be granted. An applicant must file an application. An application is then reviewed by the Department to determine whether there is sufficient information for the application to move forward in processing, i.e. did the applicant provide sufficient to warrant the Department's investment of time and resources to evaluate the application. This is known as the "correct and complete" determination under §85-2-302, MCA. If there is insufficient information to move forward and the applicant fails to provide sufficient information after notice, the application is terminated.

Once an application correct and complete, it must be noticed to the public. Others are given the opportunity to object to an application. §§85-2-308, -309, MCA. If valid objections are filed, the Department shall hold a hearing on the objections under the contested-case provisions (mini-trial) of the Montana Administrative Procedure Act (MAPA), Title 2, Chapter 4, Part 6, MCA. A Department hearing examiner is appointed to conduct the proceeding. After the hearing, the Department issues a final decision granting or denying the application. Decisions from the hearing examiner are subject to review in the district court under MAPA, Title 2, Chapter 4, Part 7, MCA. If there are no objections or if objections are resolved, the application is evaluated by the Department's Regional Office to which it was submitted for compliance with the applicable criteria. The Department then either grants the application or issues a statement of opinion under §85-2-310(3) explaining why it has denied the application. When objectors settle their objections with an applicant, the Department (either the Regional Office or the hearing examiner if other objectors remain) reviews the settlement conditions. The Department is not bound by the settlement but can accept those conditions that relate to making sure the criteria under §§85-2-311 and -402, MCA are met. Mont. Admin. R. 36.12.207. An applicant issued a statement of opinion may request a hearing before the Department as to why the Department's statement of opinion is in error. If no hearing is held, the statement of opinion becomes final. If a hearing is requested, it is held and a final decision by the Department is issued. This hearing is held as a show cause hearing before the Department where the applicant can present any relevant testimony and evidence as to why the statement of opinion is in error and the application should be granted. The final decision of the Department is then appealable to the district court just as a decision in a contested case with objectors.

In either case, the Department's position that an applicant has failed to prove the requisite criteria may not be known until an applicant has invested substantial resources in a contested case proceeding or in settlement with objectors. This bill proposes to remedy that situation.

PROPOSED PROCESS

The process proposed in this Bill is generally as follows. The process is the same through the correct and complete determination, with the exception that the Department notices all applications received on its website. After the application is determined correct and complete, the Department now has authority to meet informally with the applicant and others to have frank discussions about the merits of its application and possible conditions, if any, that might allow granting an application. The Department has 120 days after the correct and complete determination to issue a preliminary determination to grant or deny an application. This preliminary determination would contain findings of fact and conclusions of law to support the Department's determination. Only if the Department preliminarily determines that the applicant has proven the requisite criteria, is the application noticed to the public. The public notice would be as it is currently, except that it would also include a summary of the Department's preliminary determination. Persons could object to the application as in the current process. the Department would hold a contested case hearing with the objectors

and the applicant under Title 2 Chapetr 4 Part 6, MCA. This is the same process as is currently used for applications with objectors. The length of the hearing process is in great measure driven by agreement of the parties as to deadlines and submissions. After the hearing, the Department hearing examiner issues a final decision reviewable by a district court in the same manner as current decisions, Title 2, Chapter 4, Part 7, MCA.

If objections are unconditionally withdrawn, the application is granted. If objections are conditionally withdrawn, the Department may consider the conditions without hearing and grant the application with such conditions as the Department determines necessary to satisfy the requisite criteria. This is consistent with the Department's discretion to condition applications under §85-2-312, MCA.

If the Department's preliminary determination is to deny the application, the application is not noticed to the public. The applicant could request a show cause hearing under §2-4-604, MCA to show cause as to why the Department's decision is in error. The applicant could submit all evidence, testimony, and argument relevant to the Department's preliminary determination. One must remember that a preliminary determination to deny would be issued only after the Department and the applicant have had an opportunity to discuss the merits of the application and what conditions, if any, might allow an application to be granted. The Department's role is as decision-maker and it is not a party to the case and does not appear as party at the show cause hearing. The Department's files are public information and the basis for the Department's decision would be set forth in the preliminary determination. Upon the request of the applicant, the Department would have designated staff experts available at the hearing for questioning by the applicant. In a show cause hearing, the applicant has the burden of coming forward with evidence as to why the Department's preliminary determination is in error and the requisite criteria are met. The applicant retains the ultimate burden of persuasion to prove the criteria under §§85-2-311 or -402, MCA, by a preponderance of the evidence. After the hearing, the Department hearing examiner issues a final decision reviewable by a district court in the same manner as current decisions, Title 2, Chapter 4, Part 7, MCA. If the Department's preliminary determination to deny the application is reversed after the show cause hearing or by a district court on review, the application would follow that process for the preliminary determination to grant.

The Department has 90 days to issue a final decision after the administrative record is closed. Expiration of any timeline in the statute does not mandate issuance of the permit or change in authorization, but only that the Department makes the necessary decision. The Department retains discretion to determine whether the requisite criteria are proven by the applicant until the statutory process is complete, subject to judicial review under MAPA. Requests by applicants for additional time at any stage of the process will be treated as a waiver of the timeline(s) for the process.

Finally, the Bill also clarifies the definition of "correct and complete" under §85-2-102(8), MCA. This clarification confirms the Department's long-standing interpretation that the term "correct and complete" means the threshold provision of sufficient information in an application for the Department to move forward to evaluate

critically the information provided for proof of the requisite criteria. The clarification is intended to address the Montana Eighteenth Judicial District Court decision in Bostwick Properties v. DNRC, Docket No. DV-08-917AX (May 2008), where the District Court held that the "correct and complete" determination was a determination by the Department that the applicant had proven the requisite criteria, ultimately mandating issuance of the permit. The term is currently found in Title 85, MCA, in eleven statutes: 1) §85-2-102 (definitions); 2) §85-2-302 (permit application); 3) §85-2-306 (exceptions to permit requirements); 4) §85-2-307 (notice of permit and change application); 5) §85-2-308 (objections to applications); 6) §85-2-316 (water reservations by government entities); 7) §85-2-360 (ground water permit applications in closed basins); 8) §85-2-363 (combined applications in closed basins); 9) §85-2-402 (change applications); 10) §85-2-436 (instream flow applications by Department of Fish Wildlife and Parks); 11) §85-20-1401 (U.S. Forest Service Compact). The term needs to be clarified because the Department does not at the correct and complete stage weigh the evidence provided by an applicant against the Department's knowledge to determine if applicant has proven the requisite criteria.

ADVANTAGES OF THE PROCESS PROPOSED IN HB40

There are numerous advantages to the process proposed in this Bill, all of which save resources for the public and improve the agency's service to the public.

First, applicants and the Department can candidly discuss applications, evidence, and possible application conditions prior to Department decisions. Applications often fail for want of additional evidence or analysis that the applicant could but did not provide in the formal process.

Second, applicants are apprised of the Department's decision early in the process prior to expenditure of resources in a hearing or for settlement with objectors. Currently, applicants learn of the Department's position on the merits of the application at or near the end of the administrative process. Applicants are frustrated by the expenditure of resources to settle or participate in a hearing only to find that the Department does not believe that he or she has proven the criteria.

Third, the public need not expend resources on applications the Department does not believe should be granted. Presently potentially affected persons must object and participate in the process, not knowing whether the Department believes that the applicant has proven the criteria.

In conclusion, after great deliberation, the Water Policy Interim Committee agreed to move forward with this Bill to address the concerns that it heard from members of the public regarding the Department's permitting and change process. The Department fully supports this Bill and believes that it will improve the agency's service to the public and save public resources. Thank you again for opportunity to weigh in on this historic legislation. The Department urges the Committee pass HB 40.

SENATE NATURAL RESOURCES
EXHIBIT NO. 6
DATE March 6, 2009
BILL NO. HB 40.

Testimony of Montana Association of Realtors®
Senate Natural Resources Committee
61st Session of the Montana Legislature
PROPONENT of House Bill No. 40

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WATER PERMIT AND CHANGE IN APPROPRIATION RIGHT PROCESS; CLARIFYING THE DEFINITION OF "CORRECT AND COMPLETE"; REQUIRING THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION TO ISSUE A PRELIMINARY DETERMINATION ON A WATER RIGHT PERMIT OR A CHANGE IN APPROPRIATION RIGHT; ~~PROVIDING FOR OBJECTIONS TO BE HEARD IN AN INFORMAL HEARING;~~ REQUIRING PERMIT OR CHANGE IN APPROPRIATION RIGHT DECISIONS WITHIN 90 DAYS AFTER CLOSE OF ADMINISTRATIVE RECORD; AND AMENDING SECTIONS 85-2-102, 85-2-307, 85-2-308, 85-2-309, 85-2-310, 85-2-401, AND 85-2-804, MCA."

Dear Chairman Gebhardt and members of the Committee:

For the record, my name is Abigail St. Lawrence, and I represent the Montana Association of Realtors® ("MAR"). MAR represents over 4,600 real estate brokers, property managers, salespersons, and affiliates throughout Montana and is the business advocate for Montana real estate professionals, representing practitioners active in all phases of real estate brokerage, management, development, and appraisal. MAR supports House Bill ("HB") 40 because it is a step in the right direction of providing much needed reform to the water permitting process.

HB 40 would revise the Montana Water Use Act administered by the Department of Natural Resources and Conservation ("DNRC") to improve the process for obtaining a water right permit, including the permit process for larger water systems serving new residential and commercial development. During the 2007-2008 interim, water users expressed to the Water Policy Interim Committee ("WPIC") two primary concerns with the existing process for new beneficial water use applications and applications to change existing water rights: the length of time that the process took and a concern that throughout the process, there was little indication of how DNRC would make its final determination, resulting in objections that could have been avoided with a preliminary decision from DNRC. Additionally, concern was expressed over the time-consuming back-and-forth between DNRC and applicants after an application has gone to public notice regarding additional issues DNRC had identified with the application. The situation is particularly problematic because only very limited changes can be made to an application after it has gone to public notice. Consequently, if DNRC identified additional deficiencies with the application after public notice, applicants could face the choice of going forward with an application they knew would likely be denied or withdrawing and resubmitting significant additional expense in many cases. Either option results in wasted time and money for all involved and, consequently, neither is a desirable result.

HB 40, brought at the request of WPIC, is the proposal from the interim to address some of the concerns with the permitting process raised by water users. Along with Rep. Cohenour, MAR spearheaded an effort with a consensus group to draft a series of amendments to improve the legislation, which amendments were adopted by the House Natural Resources Committee. As amended and now before this committee, HB 40 improves the procedural aspects and takes in to consideration the concerns expressed to WPIC while also avoiding the confusion of mixed messages on burdens of proof at hearings and without altering the substance of the Water Use Act.

Permit process reform is needed, particularly for larger workforce housing developments where public wells are necessary to efficiently provide water for domestic consumption. The current process of obtaining a new beneficial water use permit is expensive and problematic for all parties involved. Applications for a beneficial water use permit average in excess of 500 days to get to a final decision, which may very well be a denial, resulting in only further delay and expense to obtain domestic water for workforce housing. Currently, the significant delay in processing is due, in part, to back-and-forth with DNRC regarding additional "issues" DNRC has with the application after the application has gone to public notice and cannot be changed. HB 40 significantly improves the process by moving the DNRC evaluation up front and by establishing an endpoint to that evaluation – referred to as a "written preliminary determination." *See*, Sec. 2(2)(a)(ii).

HB 40 also addresses a potential conflict of interest in which the DNRC personnel authoring the written preliminary determination granting or denying the permit application could be appointed the DNRC hearing examiner to preside over a contested case hearing between the applicant and objectors. Section 5(1)(b)(i) allows an applicant to request a hearing examiner not involved in the written preliminary determination. This provision provides an option for applicants to address potential conflicts of interest within the DNRC process.

It is important to keep in mind that HB 40 applies to both applicants for new beneficial water use permits and existing water right holders seeking to change their existing water rights. Consequently, this is not a situation where it is exclusively those seeking new water rights versus existing water right holders. In some regards, those with existing water rights are most affected by the permit process, as they are potentially involved as both objectors (to new beneficial water use permit applications) and applicants (for change authorizations). HB 40 strikes an appropriate balance of regulatory and procedural certainty for applicants, as well as procedural clarity and protection of existing water rights for objectors. Please recommend a "do pass" on House Bill No. 40. Thank you, and I will be available for any questions.

SENATE NATURAL RESOURCES
EXHIBIT NO. 7
DATE March 6, 2009
BILL NO. HB40

Written Testimony – HB40

Friday March 6, 2009
3:00 PM
RM 422

Chairman Gebhardt;

The Montana Building Industry Association (MBIA) is the Association of Home builders and related industries in Montana. We have 2300 small business members, employing over 26,000 people across Montana. We have 9 local associations and build between 65 – 80% of Montana's homes each year.

We appear before the committee in support of HB40, as amended in the House of Representatives. HB40 is largely a result of the Water Policy Interim Committee and a consensus process that developed early in this legislative session.

Currently the process of applying for and being granted a new water right in a closed basin is completely unworkable. Over the past 2 years, the DNRC has not granted a single new water right through the process developed by HB831 (2005).

HB40, as amended is an attempt to improve the process. It is our belief that HB40, as amended is the first step in creating a working water right approval process by granting DNRC the authority to preliminarily grant or deny a water right and laying out a defined process that leads to a final decision.

Specifically, HB40:

- Clearly defines "correct and complete" for the purposes of a water right application.
- Creates a 120 day period in which DNRC can hold informal hearings with the applicant and potential objectors.
- Requires DNRC to make a preliminary decision to grant or deny at the end of the 120 day period.
- If the application is granted, the DNRC issues a public notice in which formal objections can be received. If objections are received the parties proceed to a contested case hearing and a final determination is made.
- If the application is preliminarily denied, the applicant has the option of holding a hearing, in front of a new hearings examiner, and make the arguments for why the preliminary determination was incorrect. If the applicant was successful, they proceed to a public notice.

We are supportive of this process because it creates a defined point in which DNRC will preliminarily grant or deny an application and outlines a defined path to a final ruling.

Additionally, we are supportive of the 120 day period for "informal hearings" as we believe this will helpful in clearing up many objections before the formal process begins. However, we do wish that there was a record kept of these proceedings, as to reduce court costs if a granted water right challenged in district court.

Finally, we believe that providing the option for an applicant to select a new hearings examiner will retain objectivity in the contested case process.

To be clear, HB40 is not a perfect solution. However, we believe it to be an improvement over the status quo. As a result we stand before you in support of HB40.

Sincerely,

Dustin Stewart
Executive Director
Montana Building Industry Association

SENATE NATURAL RESOURCES
EXHIBIT NO. 8
DATE March 6, 2009
BILL NO. HB 40

House Bill 40
March 6, 2009
Presented by Robert Lane
Senate Natural Resources Committee

Mr. Chairman and committee members, for the record I am Robert Lane, Chief Legal Councel of Montana Department of Fish, Wildlife & Parks (FWP).

HB 40 represents a major change in the water right permitting process. FWP supports the fundamental change being proposed.

At meetings of the Water Policy Interim Committee, water right applicants, and those who represent them repeatedly expressed frustration with the application process, not only because it takes a long time, but because it is unpredictable. Applicants can invest a lot of time and money in an application and still be told no. This bill would not guarantee an outcome. However, would help because applicants will know much earlier if they will have a difficult time getting a permit.

HB 40 first clarifies that a correct and complete application is one that contains enough information for the Department of Natural Resources and Conservation (DNRC) to begin evaluating it, not to determine whether the application meets the water right permit or change criteria.

HB 40 also makes it clear that DNRC has the authority to communicate with applicants, evaluate evidence submitted at an early stage and communicate shortfalls in evidence earlier in the process. This is done by creating a new step in the process that requires a "preliminary determination" prior to the application being sent to the larger public for review. If the preliminary determination results in a recommendation to deny the permit, the applicant may appeal that decision to the department. DNRC may then affirm its preliminary determination or propose to grant the permit. Either way the Department proposes to grant a permit, whether before or after a hearing, a notice of the proposal must be published and other parties then have a chance to object.

Applicants want a faster permit process and predictability. This bill improves the permitting process for applicants but preserves other water right holders opportunity to object to an application. FWP urges you to vote for H.B. 40.

BUSINESS REPORT

MONTANA SENATE
61st LEGISLATURE - REGULAR SESSION

SENATE NATURAL RESOURCES COMMITTEE

Date: Friday, March 6, 2009 **Time:** 3:00 pm
Place: Capitol **Room:** 422

BILLS and RESOLUTIONS HEARD:
Prefix (HB, HR, HJR, SB, SR, or SJR) and number. Add Postponed (PP) when appropriate:

HB 39, HB 40, HB 41

HB 39	HB 41		
HB 40			

EXECUTIVE ACTION TAKEN:
Prefix (HB, HR, HJR, SB, SR, or SJR) and number. Enter P(pass) F(failed) DPAA (do pass as amended) BC(be concurred in) BCAA (be concurred in as amended):

COMMENTS:

Kelly Gebhardt

SEN. Kelly Gebhardt, Chairman

MONTANA STATE SENATE
Roll Call
NATURAL RESOURCES COMMITTEE

DATE: March 6, 2009

NAME	PRESENT	ABSENT/ EXCUSED
SENATOR KELLY GEBHARDT, CHAIR	✓	
SENATOR DEBBY BARRETT, VICE CHAIR	✓	
SENATOR AUBYN CURTISS		E
SENATOR KEN HANSEN	✓	
SENATOR CHRISTINE KAUFMANN		E
SENATOR JIM KEANE	✓	
SENATOR GARY PERRY		E
SENATOR JIM PETERSON		E
SENATOR DONALD STEINBEISSER	✓	
SENATOR MITCH TROPILA		E
SENATOR DAVID WANZENRIED	✓	

MONTANA STATE SENATE
Visitors Register

Natural Resources Committee Date 3/6

Bill No. 41 Sponsor(s) Cohenour

PLEASE PRINT PLEASE PRINT PLEASE PRINT

Name and Address	Representing	Support	Oppose	Inf.
Myra Shults	JPIA MAG	✓		
Abigail St. Lawrence	Mont. Assn. Realtors	✓		
Jerry Chambers	DEQ			✓
Bonnie Lovelace	DEQ			✓
~~UTILITY SOLUTIONS~~				
DON MACINTYRE	UTILITY SOLUTIONS	✓		
MARK AAGENES	MTCI	X		
Candace Witt	DEQ/EC			✓
Bob Lane	DFWP	X		

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

MONTANA STATE SENATE
Visitors Register

Natural Resources Committee Date 3/6

Bill No. 40 Sponsor(s) Cohenour

PLEASE PRINT PLEASE PRINT PLEASE PRINT

Name and Address	Representing	Support	Oppose	Inf.
Tim Schaff Fishtail	Self	yes		
Debbie Schaff Fishtail	Self	yes		
HANNELORE Sharbono	Self	yes		
Myra Shults	JPIA / MMAC	✓		
Abigail St. Lawrence	Mont. Assn. Realtors	✓		
Don MacIntyre	Utility Solutions	✓		
Holly Franz	PPL Montana	✓		
Ronda Wiggers	Mt Water Well Drillers	X		
Tim DAVIS	MSGC	✓		
Dustin Stewart	MBIA	✓		
Mike Murphy	MWRA	X		
Kristen Evans	AGAL, SWRCoal	X		
John Vincent	MFBF	X		
Mark La Rance	MTCL	x		
Candace West	DNRC	x		
Bob Lane	DFWP	X		

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

MONTANA STATE SENATE
Visitors Register

Natural Resources Committee Date 3/6

Bill No. 39 Sponsor(s) Cohenour

PLEASE PRINT PLEASE PRINT PLEASE PRINT

Name and Address	Representing	Support	Oppose	Inf.
HANNELORE SHARBAUD	SELF	Yes		
Jim Schaff - Fishtail	Self	yes		
Debbie Schaff - Fishtail	Self	yes		
Colleen Coyle - Bozeman	Montana Water Court			✓
Myra Shults	JPIA/MACo	✓		
Sarah Bond	AG	✓		
Holly Franz	PPL Montana	✓		
Walt Evans	AGAI, Sr WRCoal	✓		
John Vincent	MFBF	✓		
Mike Murphy	MWRA	X		
Mark Aagenes	MTU	X		
Candace West	DNRC	X		
Bob Lane	DFWP	X		

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.